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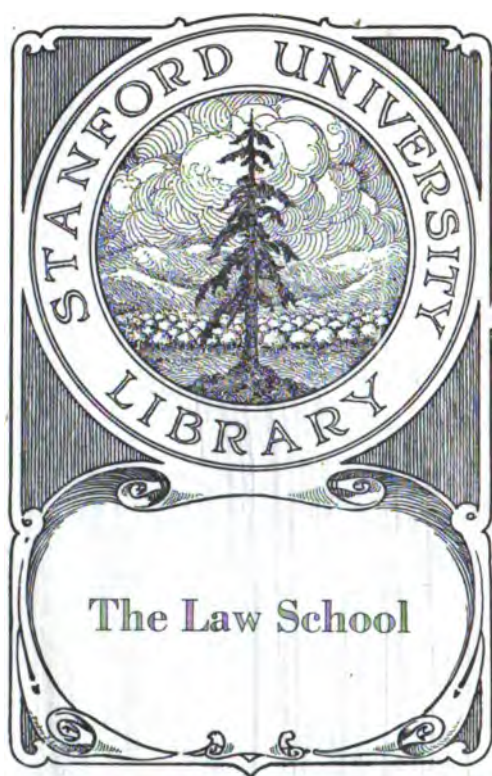
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THE
NEW PRACTICE
OF THE
COURTS OF KING'S BENCH,
COMMON PLEAS,
AND
EXCHEQUER OF PLEAS,
IN PERSONAL ACTIONS;

AND
EJECTMENT:

CONTAINING
ALL THE RECENT STATUTES, RULES OF COURT, AND
JUDICIAL DECISIONS, RELATING THERETO.

By WILLIAM TIDD, Esq.
OF THE INNER TEMPLE, BARRISTER AT LAW.

LONDON:
PRINTED FOR SAUNDERS AND BENNING, (SUCCESSORS TO J. BUTTERWORTH
AND SON,) 43, AND H. BUTTERWORTH, 7, FLEET STREET.

1837.

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TO
THE RIGHT HONOURABLE
THOMAS LORD DENMAN,
LORD CHIEF JUSTICE OF ENGLAND,

ETC. ETC. ETC.

THIS WORK IS DEDICATED;

WITH

THE HIGHEST RESPECT

FOR THOSE GREAT TALENTS,

AND

THAT DISTINGUISHED INDEPENDENCE OF CHARACTER,

AND UNIFORM INTEGRITY OF CONDUCT,

WHICH RAISED HIM

TO HIS PRESENT HIGH JUDICIAL SITUATION;

AND

WHICH HE SO EMINENTLY DISPLAYS,

IN THE DISCHARGE OF ITS ARDUOUS DUTIES:

AND

WITH THE MOST SINCERE ESTEEM

FOR THOSE VIRTUES,

WHICH

ADORN HIS CHARACTER IN PRIVATE LIFE.



PREFACE.

SINCE the publication of the *ninth* Edition of the Author's Practice, in *Trinity* Term 1828, many important alterations have been made in the Practice of the Superior Courts of Law at *Westminster*, by various Statutes, Rules of Court, and Judicial decisions. The principal Statutes, by which these alterations were effected, are the Administration of Justice act, (11 Geo. IV. & 1 W. IV. c. 70.); the Speedy Judgment and Execution Act, (1 W. IV. c. 7.); the Examination of Witnesses act, (1 W. IV. c. 22.); the Interpleader act, (1 & 2 W. IV. c. 58.); the Uniformity of Process act, (2 W. IV. c. 39.); and the Law Amendment act, (3 & 4 W. IV. c. 42).

In pursuance of the power given by the Administration of Justice act, general rules were made by all the Judges, in *Trinity* term 1831, and *Hilary* term 1832. The rules of *Trinity* term chiefly relate to the putting in and justifying of *special* bail; the shortening of *declarations* in actions of *assumpsit*, or *debt*, on bills of exchange, or promissory notes, and the common counts; the delivery of *particulars* of the plaintiff's demand, under those counts; the time for delivering declarations *de bene esse*; the service of declarations in *ejectment*; the time for pleading; rules to plead several matters; and judgment of *non pros*, &c. The object and intent of the rules of *Hilary* Term appear to have been, to assimilate the practice of the different courts, and to render the proceedings therein more expeditious, and less expensive to the suitors.

In consequence of the foregoing statutes and rules of court, *three* Supplements have been already published by the Author, to the *ninth* edition of his Book of Practice: The first of these Supplements, which was brought out in *Michaelmas* Term 1830, contained all the statutes, rules of court, and decided cases, to that time, particularly the Administration of Justice act, and also a practical treatise on the *Tender* of money, and the law relating to the *Fees* of Officers of the courts, &c. The *second* Supplement, which was published in *Hilary* vacation 1832, contained the general rules of the courts, since the Administration of Justice act, with introductory statements of the practice, as it existed before, and was affected by those rules: And, not to mention the act for the Uniformity of Process in personal actions, with the general rules of the courts thereon, which appeared in *November* following, the *third* Supplement, which was published in *December* 1833, and in which the Uniformity of Process act was incorporated, contained the Practice of the superior courts of law, in personal actions, and *ejectment*, &c. so far as it was altered or affected by the statutes for the amendment of the law, &c. and the rules of court and decisions thereon.

These Supplements, however, were but partial; and the last of them was published more than *three* years ago; since which, many important alterations have been made in the Practice, by subsequent statutes, rules of court, and judicial decisions. It is therefore hoped, that the following Work, in which the Author has collected and arranged all the recent statutes and rules of court on practical subjects, including those noticed in the above Supplements, with the judicial decisions thereon, to the present time, and on other matters of frequent occurrence in practice, will not be unacceptable to the profession.

Under the Law Amendment act, general rules were made by all the judges of the superior courts of common law at *Westminster*, in *Hilary* term 1834; which having been laid the requisite time before both houses of parliament, came into operation on the first day of *Easter* term following. These rules, which may be considered as the commencement of a new *era* in pleading, are of two kinds: 1st, gene-

ral rules, relating to all pleadings; and, 2dly, rules relating to pleadings in the particular actions of *assumpsit*, *covenant*, *debt*, *detinue*, *case*, and *trespass*.

In treating of pleas in bar, as governed by these rules, the Author has considered, in the 27th Chapter, 1st, the several grounds of defence, and what pleas, adapted thereto, may be pleaded in actions upon *contracts*, and for *wrongs* independently of contract: 2dly, the power of the judges to make alterations in the mode of pleading, &c. and the rules made by them in pursuance thereof: 3dly, what must now, since the making of the above rules, be proved by the *plaintiff*, on the general issue, or common plea in denial of the contract or wrong stated in the declaration: 4thly, what might have been formerly, and may now be given in evidence thereon by the *defendant*, or must be pleaded specially, in actions upon contracts and for wrongs: 5thly, in what cases the special matter may be given in evidence, under the general issue, by act of parliament: 6thly, the pleas in actions by and against *bankrupts*, or *insolvent* debtors, and their respective *assignees*; or by and against *executors* or *administrators*, *heirs* or *devisees*: 7thly, the title, commencement, body, and conclusion of pleas: 8thly, in what cases the defendant might formerly have pleaded, and is now allowed to plead, several matters: and, lastly, the practice as regards the signing, delivering, filing, adding, amending, waiving, abiding by, striking out, or setting aside pleas, &c. And though the new rules of pleading in particular actions do not extend to replications, yet, in order to explain the different modes of replying to pleas in bar, and in what manner the replication should deny or confess and avoid the facts stated therein, the several reported cases which have been recently determined thereon, in actions upon contracts and for wrongs, are noticed in the 28th Chapter.

Some additional rules were also made by the judges, in pursuance of the law amendment act, and of the powers given them by the administration of justice act, relating to the *practice* of the courts, in *Hilary* term 1834, which took effect on the first day of *Easter* term following. These rules, which are introduced in their proper places,

chiefly relate to *demurrers*, and proceedings in *error*; and contain provisions respecting the admission of written documents.

The judicial decisions of the courts, referred to in the following work, are for the most part founded on the statutes and rules of court before noticed. But besides these decisions, the Author has, in order to render his work more extensively useful, collected and arranged the decisions on other matters of frequent occurrence in practice; such as an attorney's right to recover, when part of his bill is taxable, and part not; staying proceedings, until *security* be given for the payment of costs; warrants of attorney, and entering up judgment thereon; the hearing of *counsel* at the trial; the assessment of *damages*; and the judge's *certificate*, to deprive a party of costs to which he would otherwise be entitled, or to entitle him to costs of which he would otherwise be deprived. Particular attention has also been paid to the following important practical subjects; *viz.* *process*; *appearance*; *special bail*; *declaration*; *motions* and *rules*, and the practice by *summons* and *order* at a judge's chambers; proceedings on the *interpleader* act; *pleas*, and *pleadings*; trials before the *sheriff*, &c.; the examination of *witnesses* on interrogatories; trials at *nisi prius*, and their incidents; *costs*, interlocutory and final; *speedy judgment* and *execution*; and writs of *error*, and the proceedings thereon.

The recent alterations in the practice of the courts are arranged in the order of the *ninth* Edition of the Practice, which is frequently referred to. And for better understanding the nature of these alterations, an introductory statement is prefixed to each statute, and rule of court, shewing the practice as it formerly stood, and in what manner it has been since altered.

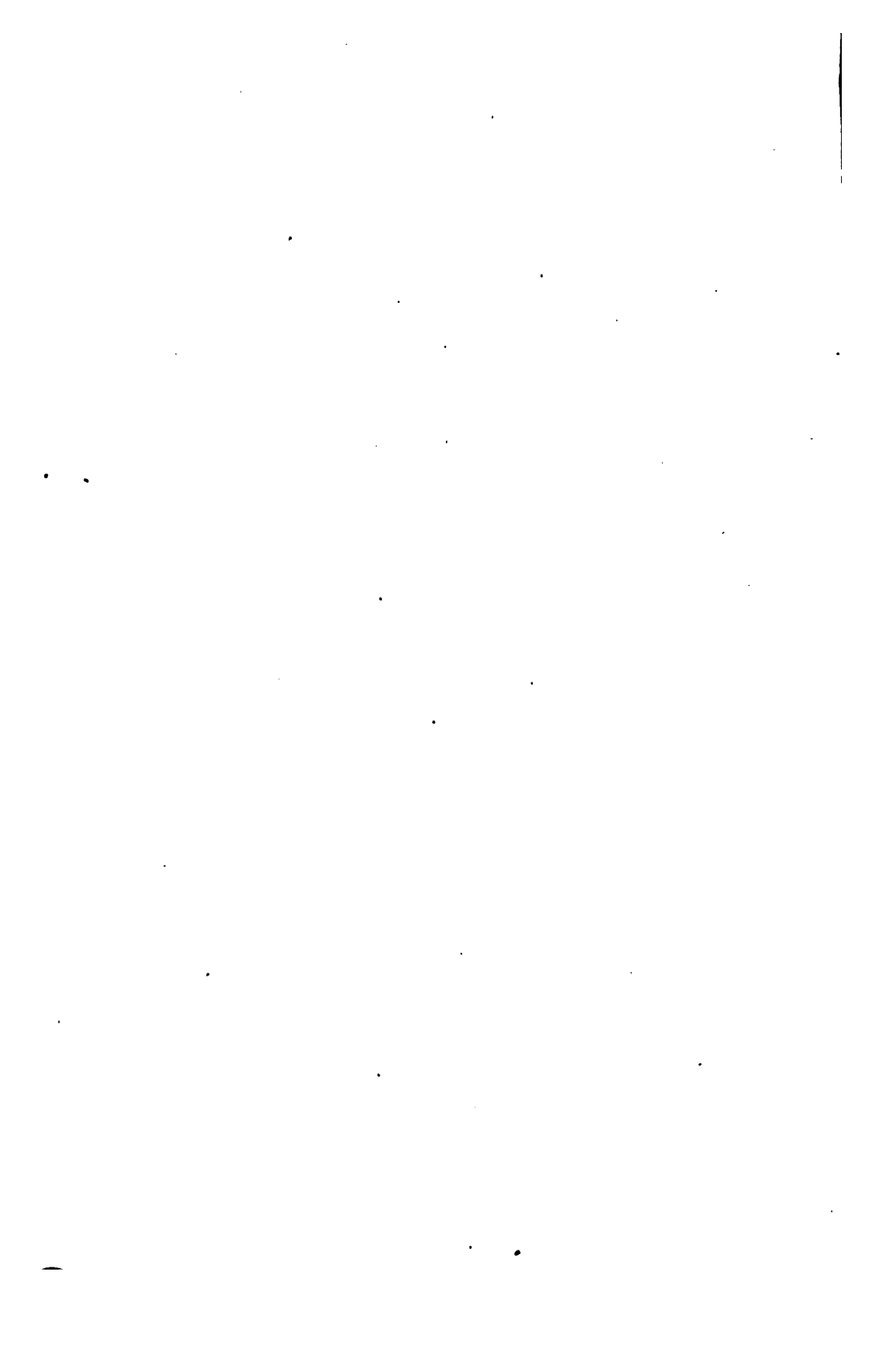
An *Appendix* is added, of *Practical Forms* in the Statutory rules of pleading, and Schedule annexed thereto, and referred to at the end of the rules of Practice: And references are made throughout to the Forms of Practical Proceedings published by the Author in 1828, as well as those in the *Appendices* to his Supplements, which contain all the Forms in the Schedules to the different statutes, and prescribed by

the rules of court : And, in the *Appendix* to the Supplement of 1833, there are nearly two hundred Practical Forms, consisting chiefly of writs and returns, entries of process, &c. *affidavits*, rules of court, judge's orders, notices, &c.

To facilitate research, copious *Tables* are prefixed to the work, of the statutes, rules of court, and names of the cases ; and all the different books are referred to, in which the cases are reported. To the whole there is intended to be a copious Analytical *Index*, which is in a state of great forwardness, and will be delivered by the publishers, to the purchasers of the present work, in the course of next *Trinity* vacation. There will also be published with the *Index*, an *Addenda* of Cases, reported since the work went to press, and which could not be inserted in the body of it.

The Author cannot conclude, without expressing his acknowledgments to Mr. *William Henry Medicott*, of the *Inner Temple*, for the assiduity and zeal with which he has assisted him in preparing the present work for publication, as well as the *ninth* Edition of the Practice, and the Supplements thereto.

TEMPLE,
6th May, 1837.



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ERRATA ET CORRIGENDA.

- Page 27 line 1, and in margin, for 8 & 9 read 9 & 10 W. III.
 30 line 15, for form read force.
 79 (i), for 2 read 3 Bing. N. R.
 96 (a), at end of note, for § 3 read § 33.
 242 (f), for 175 read 157.
 386 line 23, for 18 read 21.
 404 (g), *dele Post*, Chap. XLVI.
 413 mistaken for page 415.

CHAP. I.

Of PERSONAL ACTIONS, and the TIME limited for their COMMENCEMENT; and of NOTICES of ACTION, &c.

PERSONAL Actions are *ex contractu, vel ex delicto*; being founded upon contract, or for wrongs, independently of contract^a. Actions upon contracts, are *account, assumpsit, covenant, debt, annuity, and, scire facias*; actions for wrongs, are *case, detinue, replevin, and trespass vi et armis*^b.

Personal actions.

It was formerly holden, that an action of *debt* would not lie against an executor or administrator, upon a simple contract made by the testator or intestate^c, except in *London*, where such an action was maintainable by the custom^d; but where the contract was made by the executor or administrator, an action of *debt* might have been maintained against him^e: And now, by the late act for the further amendment of the law, and better advancement of justice^f, “an action of *debt* on simple contract shall be maintainable, in any court of common law, against any executor or administrator.” It should also be observed, as connected with this subject, that, by another clause of the same statute^g, “no wager of law shall be hereafter allowed.”

Action of debt on simple contract, against executor or administrator.

Wager of law abolished.

^a 1 Bac. Abr. 26. Gilb. C. P. 5. and see Tidd Prac. 9 Ed. 1. The frequent references to Tidd's Practice are intended to shew the connexion between that work and the present; and how the practice of the courts stood, before it was altered by subsequent statutes, rules of court, and judicial decisions.

^b For the different causes of action comprised under the above heads, see Tidd Prac. 9 Ed. 1. 4, &c.; and for an Outline or Summary of real and mixed actions, see Sup. thereto, 1833, pp. 1, &c., and the authorities there referred to, particularly Mr. Roscoe's valuable treatise on real actions, &c.

^c Barry v. Robinson, 1 New Rep. C. P.

293, and the authorities there cited.

^d City of London's case, 8 Co. 126. Bohun Priv. Lond. 147. 149. 151.

^e Riddell v. Sutton, 5 Bing. 200. 2 Moore & P. 345. S. C.

^f 3 & 4 W. IV. c. 42. § 14. and see the third Report of the Common Law Commissioners, pp. 17, 18. 74.

^g 3 & 4 W. IV. c. 42. § 13. And as to wager of law, its antiquity, &c., and the cases in which it was or was not formerly allowable, see 3 Chit. Bl. Com. 341. 1 Chit. Pl. 5 Ed. 128, 9. Tidd Prac. 9 Ed. 649. 3 Rep. C. L. Com. 17, 18. 74. and see Barry v. Robinson, 1 New Rep. C. P. 297. King v. Williams, 2 Barn. & C. 538. 4 Dowl. & R. 3. S. C.

Actions for wrongs, by and against whom brought.

By stat. 4 Edw. III. c. 7.

By law amendment act.

Executors, or administrators, may bring actions for injuries to real estate of deceased.

Actions may be brought against executors or administrators, for an injury to property, real or personal, by deceased.

For *wrongs* independently of contract, the action must in general be brought by the party to whom the injury is done, against the party doing it; and if either of the parties die, the action is gone; for it is a rule, that *actio personalis moritur cum persona*^a. But there were some exceptions to this rule, chiefly arising from an equitable construction of the statute 4 Edw. III. c. 7. by which *executors* shall have an action of *trespass*, for a wrong done to their testator^b. And now, by the law amendment act^c, reciting that there is no remedy provided by law for injuries to the *real estate* of any person deceased, committed in his life time; nor for certain wrongs done by a person deceased in his life time to another, in respect of his property, *real or personal*; it is enacted, that "an action of *trespass*, or trespass on "the *case*, as the case may be, may be maintained by the executors or "administrators of any person deceased, for any injury to the *real* "estate of such person, committed in his life time, for which an action "might have been maintained by such person, so as such injury shall "have been committed within *six* calendar months before the death of "such deceased person; and provided such action shall be brought "within *one* year after the death of such person; and the damages, "when recovered, shall be part of the personal estate of such person: "And further, that an action of *trespass*, or trespass on the *case*, as the "case may be, may be maintained *against* the executors or administra- "tors of any person deceased, for any wrong committed by him in his "life time to another, in respect of his property, *real or personal*, so as "such injury shall have been committed within *six* calendar months "before such person's death, and so as such action shall be brought "within *six* calendar months after such executors or administrators "shall have taken upon themselves the administration of the estate and "effects of such person; and the damages to be recovered in such ac- "tion shall be payable in like order of administration, as the simple "contract debts of such person." But if an action be brought by a termor, upon 7 & 8 Geo. IV. c. 31. for an injury done to his house, within *three* calendar months from the offence committed, and that action abates by the death of the termor, after the *three* months have expired, his executor cannot bring a fresh action^d: And it is doubt-

^a 1 Wms. Saund. 5 Ed. 216. a. (1.), and see Bird v. Relfe, (or Relfh,) 1 Nev. & M. 415. 4 Nev. & M. 878. 2 Ad. & E. 778. S. C.

^b 2 Bac. Abr. 444, 5. and see Tidd Prac. 9 Ed. 9, Hambly v. Trott, Cowp.

375. Wheatley v. Lane, 1 Wms. Saund. 5 Ed. 217. Knights v. Quarles, 4 Moore, 532. 2 Brod. & B. 102. S. C.

^c 3 & 4 W. IV. c. 42. § 2. and see 3 Rep. C. L. Com. 17. 74.

^d Till-Adam (or Adam) v. Inhabitants

ful, whether an executor of a termor can in *any* case bring an action upon the 7 & 8 Geo. IV. c. 31. for an injury sustained in the life time of his testator.

By the statute 11 Geo. IV. & 1 W. IV. c. 47. for consolidating and amending the laws for facilitating the payment of debts out of *real estate*, (Sir *Edward Sugden's* act,) "all wills and testamentary limitations, dispositions, or appointments, made by any person or persons, of or concerning any manors, messuages, lands, &c., whereof any person or persons, at the time of his, her or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her or their last wills or testaments, shall be deemed or taken (only as against such person or persons, with whom the person or persons making such wills, &c., shall have entered into any bond, covenant, or other specialty, binding his, her or their heirs,) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect:"^a And for enabling such creditors to recover upon such bonds, covenants, and other specialties, it is thereby enacted, that "in the cases before mentioned, every such creditor shall and may have and maintain his, her and their action and actions of *debt* or *covenant*, upon the said bonds, covenants, and specialties, against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first mentioned devisee or devisees jointly, by virtue of that act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been, for any false plea by him pleaded, or for not confessing the lands or tenements to him descended:^b And if in any case there shall not be any heir at law, against whom, jointly with the devisee or devisees, a remedy is thereby given, in every such case, every creditor, to whom by that act relief is so given, shall and may have and maintain his and their action and actions of *debt* or *covenant*, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid."^c

Against heirs,
or devisees.

of Bristol, 4 Nev. & M. 144. 2 Ad. & E. 389. S. C.

^a § 2. and see stat. 3 W. & M. c. 14. § 2. made perpetual by 6 & 7 W. III. c. 14. These statutes, however, are repealed

by 11 Geo. IV. & 1 W. IV. c. 47. § 1.

^b Stat. 11 Geo. IV. & 1 W. IV. c. 47.

§ 3. and see stat. 3 W. & M. c. 14. § 3.

^c Stat. 11 Geo. IV. & 1 W. IV. c. 47.

§ 4.

Limitation of
personal actions.

It will next be proper to take a view of the alterations which have been made in the law respecting the limitation of *personal* actions^a; and to shew what evidence is required of a new or continuing contract, and to prove that the action was commenced in due time, so as to prevent the operation of the statutes of limitations.

By stat. 21 Jac.
I. c. 16. § 3.

By the statute 21 Jac. I. c. 16. § 3. it is enacted, that "all actions of trespass *quare clausum fregit*, &c., *detinue*, *trover*, and *replevin*, for taking away goods and cattle; all actions of *account*, and upon the *case*, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants; all actions of *debt*, grounded upon any lending or contract without specialty, or for arrearages of rent; and all actions of *assault*, *menace*, *battery*, *wounding*, and *imprisonment*, shall be commenced and sued within the times hereinafter expressed, and not after; that is to say, the said actions upon the *case*, (other than for *slander*,) *account*, *trespass*, *quare clausum fregit*, &c., *debt*, *detinue*, and *replevin*, within *six* years next after the cause of such actions or suit, and not after; actions of *assault*, and *battery*, *wounding*, and *imprisonment*, within *four* years; and actions upon the *case* for words, within *two* years next after the words spoken, and not after."

Savings for in-
fants, &c.

This statute, which contained the usual savings for infants, *femes covert*, and persons *non compos mentis*, imprisoned, or beyond the seas, was confined to the particular actions enumerated therein, and did not extend to actions of *covenant*, or *debt* on *specialty*, or other matter of a higher nature; but only to actions of *debt* upon a lending or contract without specialty, or for arrearages of rent reserved on parol leases^b, &c. A *scire facias* also, being founded on matter of record, was not within the statute^b. But now, by the law amendment act^c, "all actions of *debt* for rent upon an indenture of demise, all actions of *covenant* or *debt* upon any bond or other specialty, and all actions of *debt* or *scire facias* upon any recognizance, and also all actions of *debt* upon any *award*, where the submission is not by specialty, or for any *fine* due in respect of any copyhold estates, or for an *escape*, or for money levied on any *feri facias*, and all actions for *penalties*, damages, or sums of money, given to the party *grieved*, by

Limitation of
actions of debt
on specialties,
&c., by law
amendment act.

^a For the limitation of actions, entries, and distresses, relating to *real* property, see Tidd *Sup.* 1833, pp. 16, &c., and, as connected therewith, the provisions of the statute 2 & 3 W. IV. c. 71. "for shortening the time of *prescription* in certain cases", *id.* 35, &c. and 2 & 3 W. IV. c. 100. "for shortening the time required in

claims of *modus decimandi*, or exemption, from or discharge of tithes", *id.* 38, &c.

^b Tidd *Prac.* 9 Ed. 15, 16. and see *Freeman v. Stacy*, Hut. 109. *Jones v. Pope*, 1 Wms. Saund. 5 Ed. 38. *Hodsdon v. Harridge*, 2 Wms. Saund. 5 Ed. 66.

^c 3 & 4 W. IV. c. 42. § 3. and see 3 Rep. C. L. Com. 16. 73.

" any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the then present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of *debt* for rent upon an indenture of demise, or *covenant* or *debt* upon any bond or other specialty, actions of *debt* or *scire facias* upon recognizance, within *ten* years after the end of the then present session, or within *twenty* years after the cause of such actions or suits, but not after; the said actions by the party grieved, *one* year after the end of that session, or within *two* years after the cause of such actions or suits, but not after; and the said other actions, within *three* years after the end of that session, or within *six* years after the cause of such actions or suits, but not after: Provided, that nothing therein contained shall extend to any action given by any statute, where the time for bringing such action is, or shall be, by any statute specially limited."^a

And it is thereby further enacted, that " if any person or persons, that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are, or shall be at the time of any such cause of action accrued, within the age of *twenty-one* years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times, after their coming to or being of full age, discovert, of sound memory, or returned from beyond the seas, as other persons, having no such impediment, should, according to the provisions of that act, have done^b: And that if any person or persons, against whom there shall be any such cause of action, is or are, or shall be, at the time of such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action, shall be at liberty to bring the same against such person or persons, within such times as are before limited, after the return of such person or persons from beyond the seas."^b

Remedy for infants, *femes covert*, &c.

Absence of defendants beyond the seas provided for.

" Provided always, that if any acknowledgment shall have been made, either by writing, signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction, on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the

Proviso in case of acknowledgment in writing, or by part payment, &c.

^a On this statute it has been holden, that *covenant* for rent in arrear may be brought within the time limited thereby; and is not confined to *six* years from the time when it became payable, by the 3 & 4

W. IV. c. 27. § 42. *Paget v. Foley*, 2 Bing. N. R. 679. 3 Scott, 120. S. C.

^b 3 & 4 W. IV. c. 42. § 4. and see 3 Rep. C. L. Com. 16. 73.

"money remaining unpaid, and so acknowledged to be due, within
 "twenty years after such acknowledgment by writing, or part payment
 "or part satisfaction, as aforesaid; or in case the person or persons
 "entitled to such action shall, at the time of such acknowledgment, be
 "under such disability as aforesaid, or the party making such acknow-
 "ledgment be, at the time of making the same, beyond the seas, then
 "within twenty years after such disability shall have ceased as afore-
 "said, or the party shall have returned from beyond seas, as the case
 "may be; and the plaintiff or plaintiffs in any such action or^a any in-
 "denture, specialty or recognizance, may, by way of replication, state
 "such acknowledgment, and that such action was brought within the
 "time aforesaid, in answer to a plea of this statute."^b

Limitation of
 actions after
 judgment, or
 outlawry, re-
 versed.

"Nevertheless, if, in any of the said actions, judgment be given
 "for the plaintiff, and the same be reversed by error, or a verdict
 "pass for the plaintiff, and, upon matter alleged in arrest of judg-
 "ment, the judgment be given against the plaintiff, that he take no-
 "thing by his plaint, writ, or bill; or if, in any of the said actions, the
 "defendant shall be outlawed, and shall after reverse the outlawry;
 "that in all such cases, the party plaintiff, his executors or adminis-
 "trators, as the case shall require, may commence a new action or
 "suit, from time to time, within a year after such judgment reversed,
 "or such judgment given against the plaintiff, or outlawry reversed,
 "and not after."^c

Stat. 21 Jac. I.
 c. 16. extended
 to Scotland.

The statutes of limitations were construed to extend to persons
 in Scotland; so that if a plaintiff or defendant resided there, he
 must have sued, or been sued, within the time limited thereby^d.

No part of the
 united kingdom,
 &c. now deemed
 beyond the seas.

And now, by the law amendment act^e, "no part of the united king-
 "dom of Great Britain and Ireland, nor the islands of Man, Guern-
 "sey, Jersey, Alderney, and Sark, nor any islands adjacent to any of
 "them, being part of the dominions of his Majesty, shall be deemed
 "to be beyond the seas, within the meaning of that act, or of the 21 Jac.
 "I. c. 16." And where an action was brought in the King's Bench,
 on a written engagement entered into in Scotland, the court held, that
 the case must be governed by the law of this country, where the statute
 of limitations had attached, although it was contended that the Scotch
 law must prevail, which would have allowed forty years for com-
 mencing the suit^f. So, upon a promissory note given in France, the

^a Sic, in printed copy of act, instead of
 on.

^b 3 & 4 W. IV. c. 42. § 5. and see 3
 Rep. C. L. Com. 16. 73.

^c § 6. and see 3 Rep. C. L. Com. 16.
 37.

^d Tidd Prac. 9 Ed. 16. and see King v.
 Walker, 1 Blac. Rep. 286. Du Belloix v.
 Lord Waterpark, 1 Dowl. & R. 16.

^e 3 & 4 W. IV. c. 42. § 7.

^f British Linen Company v. Drum-
 mond, 10 Barn. & C. 903. 1 Barn. &

payee may sue the maker, if resident in *England*, during *six* years from the time it becomes due; although, by the law of *France*, all actions upon promissory notes are wholly barred after *five* years from the date of the protest thereon^a. But *Ireland* is still considered as a place beyond the seas, within the statute 4 Ann c. 16. § 19, notwithstanding the act of Union, and the 3 & 4 W. IV. c. 42. § 7^b.

In actions for *wrongs*, particular times of limitation are frequently appointed by statute, different from those in common cases: Thus, by the statute 7 & 8 Geo. IV. c. 53^c, it is enacted, that "if any action or suit shall be brought, raised, or commenced, against any officer of *excise*, or any person employed in the revenue of *excise*, or any person acting in the aid and assistance of such officer, or person so employed as aforesaid, for any thing done in pursuance of that act, or any other act or acts of parliament relating to the revenue of *excise*, such action or suit shall be commenced within the space of *three calendar* months next after the cause of action shall have arisen." The action must also be brought within the same period, for any thing done in pursuance of the court of requests acts for *Westminster*^d, the *Tower Hamlets*^e, or *London*^f; the Act for making a communication from *Mary-le-bone* park, &c. to *Charing Cross*^g; the Act relating to *copper* tokens^h, &c.; the *new street* Actⁱ; the Act for regulating the *watermen* and *lightermen* of the river *Thames*^k, &c.; the Act to permit the sale of *beer* and *cyder* by retail, in *England*^l; and the *Poor Law Amendment* Act^m: And the action must be brought within *three lunar* months, by the Act to amend the laws relating to the importation of *corn*ⁿ; within *six calendar* months, by the Act to prevent the cruel and improper treatment of *cattle*^o; the Act relating to the making

Limitation of actions for wrongs.

By stat. 7 & 8 Geo. IV. c. 53.

By other statutes.

Ad. 284, 5. S. C. cited; and see *Trimber v. Vignier*, 4 Moore & S. 695.

^a *Huber v. Steiner*, 2 Bing. N. R. 202. 2 Scott, 304. 1 Hodges, 206. S. C.

^b *Lane v. Bennett*, 1 Meeson & W. 70. 1 Tyr. & G. 441. 1 Gale, 368. S. C. and see *Battersby v. Kirk*, 2 Bing. N. R. 584. 3 Scott, 11. 1 Hodges, 451. S. C.

^c § 115. This and the following statutes, relating to the limitation of actions, &c., are additional to those in *Tidd Proc.* 9 Ed. 19, &c.

^d 6 & 7 W. IV. c. cxxxvii. § 85. and see 23 Geo. II. c. 27. § 23.

^e 23 Geo. II. c. 30. § 24.

^f 5 & 6 W. IV. c. xciv. § 63; and see

39 & 40 Geo. III. c. civ. § 18.

^g 53 Geo. III. c. 121. § 87.

^h 57 Geo. III. c. 46. § 17.

ⁱ 57 Geo. III. c. xxix. § 136.

^k 7 & 8 Geo. IV. c. lxxv. § 93.

^l 11 Geo. IV. & 1 W. IV. c. 64. § 28.

^m 4 & 5 W. IV. c. 76. § 104.

ⁿ 9 Geo. IV. c. 60. § 48.

^o 3 Geo. IV. c. 71. § 6. It should be observed, however, that this statute is repealed by the 5 & 6 W. IV. c. 69. by which latter statute, § 19. the action must be commenced within *one* calendar month next after the fact committed: And for a determination thereon, see *Hopkins v.*

and sale of *bread*^a; the Act for amending the law respecting *pilots* and *pilotage*^b; and the Metropolitan *police* Act^c: within *six lunar* months, by the Act for regulating the rates of *portage*^d; and the *mutiny*^e, and *marine*^f, Acts; and within *twelve* months, by the Act respecting the *postage* of letters^g.

In *trover*.

The statute of limitations, 21 Jac. I. c. 16. § 3. is a bar in an action of *trover*, commenced more than *six* years after the conversion, although the plaintiff did not know of it until within that period; the defendant not having practised any fraud, in order to prevent the plaintiff from obtaining that knowledge at an earlier period^h. But, to support a plea of the statute of limitations in *trover*, by shewing a conversion more than *six* years before the action brought, the defendant must either prove an actual conversion in fact, or give evidence of an absolute and unqualified demand and refusal, before that periodⁱ: And the mere taking away and destroying a part of the property, which is in the hands of a bailee, who may deliver up the rest, is not a conversion of the whole, so as to entitle the bailor to maintain *trover* for the whole^j. To a declaration in *trover* by an administrator, for a conversion after the death of the intestate, a plea of not guilty of the premises within *six* years, was holden to be bad upon special demurrer; it not being equivalent to an allegation, that the cause of action did not accrue within *six* years^k.

Form of pleading.

Means of preventing operation of statutes of limitations, in actions upon contracts.

In order to prevent the operation of the statutes of limitations, it is in general necessary for the plaintiff to prove that the action was commenced in due time after the cause of it originally accrued, or was subsequently admitted to continue. Two questions, therefore, frequently occur on these statutes, in actions upon contracts; 1st, what shall be deemed sufficient evidence of a new or continuing contract, so as to prevent the operation of them; and, secondly, at what time the action may be said to have been commenced.

Acknowledgment or promise when sufficient, or not, for that purpose.

It was formerly holden, that a bare acknowledgment of a debt by the defendant, and that of the slightest nature, within *six* years be-

Crowe, 7 Car. & P. 373. *per* Ld. Denman, Ch. J.

^a 3 Geo. IV. c. cvi. § 29.

^b 6 Geo. IV. c. 125. § 84.

^c 10 Geo. IV. c. 44. § 41.

^d 39 Geo. III. c. lviii. § 18.

^e 6 & 7 W. IV. c. 8. § 75.

^f 6 & 7 W. IV. c. 9. § 58.

^g 55 Geo. III. c. 153. § 54.

^h Granger v. George, 5 Barn. & C.

149. 7 Dowl. & R. 729. S. C.; and see Ballantine, on the statute of limitations, 97, &c. Tidd *Prac.* 9 Ed. 21.

ⁱ Philpot v. Kelly, 1 Har. & W. 134. 4 Nev. & M. 611. 3 Ad. & E. 106. S. C. and see Fraser v. Swansea Canal Company, 1 Ad. & E. 354. 3 Nev. & M. 391. S. C. Jenkins v. Cooke, 1 Ad. & E. 372. (a.).

^k Pratt v. Swaine, 8 Barn. & C. 285.

² Man. & R. 350. S. C.

fore the commencement of the action, was sufficient to prevent the operation of the statutes of limitations^a: but, from more recent cases^b, it seems that, in order to take a case out of the statutes, it is necessary to prove an actual promise by the defendant, or an absolute and unqualified acknowledgment, from which a promise may be inferred, to pay the debt, as stated in the declaration; and if the promise was conditional, that the condition was performed before the bringing of the action.

Before the making of the statute 9 Geo. IV. c. 14. (Ld. *Tenterden's* Act,) various questions had arisen, in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the enactments of the statute 21 Jac. I. c. 16. § 3.^c; and it being deemed expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof, it was enacted by the above statute, (9 Geo. IV. c. 14.^d.) that "in actions of *debt*, or upon the *case*, grounded upon any simple contract, no acknowledgment or promise, by *words* only, shall be deemed sufficient evidence of a new or continuing contract, whereby "to take any case out of the operation of the said enactments, or "either of them, or to deprive any party of the benefit thereof, unless "such acknowledgment or promise shall be made or contained by "or in some *writing*, to be signed by the party chargeable thereby; "and that where there shall be two or more joint contractors, or "executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or "by reason only of any written acknowledgment or promise, made "and signed by any other or others of them: Provided always, that "nothing therein contained shall alter or take away, or lessen the "effect of any payment of any principal or interest, made by any "person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors or

By Lord *Tenterden's* Act.

In actions of debt, or upon the case, no acknowledgment shall be deemed sufficient, unless it be in writing, or by part payment.

Case of joint contractors.

Effect of payment of principal, or interest.

Plaintiff, though barred as to one or more joint

^a Tidd *Prac.* 9 Ed. 22, &c.

^b *A'Court v. Cross*, 3 Bing. 329. 331. *Tullock v. Dunn*, Ry. & M. 416. *per Abbott*, Ch. J. *McCulloch v. Dawes*, 9 Dowl. & R. 40. *Ayton v. Bowles*, 12 Moore, 305. 4 Bing. 105. S. C. *Tanner v. Smart*, 6 Barn. & C. 603. 9 Dowl. & R. 549. S. C. *Brydges v. Plumptre*, 9 Dowl. & R. 746. *Pierce v. Brewster*, 12 Moore,

515. *Gould v. Shirley*, 2 Moore & P. 581. *Haydon (or Eden) v. Williams*, 4 Moore & P. 811. 7 Bing. 163. S. C. *Lang v. Mackenzie*, 4 Car. & P. 463. *per Tindal*, Ch. J. *Bealey v. Greenslade*, 1 Price N. R. 144. 2 Cramp. & J. 61. 2 Tyr. Rep. 121. S. C.

^c *Ante*, 4.

^d § 1.

contractors, may proceed against others.

" administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the therein recited acts, or that act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff." ^a

Pleas in abatement, for non-joinder.

And it is thereby further enacted, that " if any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts, or that act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same." ^b

Commencement and operation of act.

This statute was limited to commence and take effect on the first day of *January 1829* ^c: And it was holden, that the *first* section of the statute had a retrospective operation, and applied to *parol* acknowledgments made before its provisions came into effect, although such acknowledgments were made, and the action brought thereon, before the commencement of the act ^d.

Decisions thereon.

Since the making of this statute, it was determined, in a case where the defendant, by letter, had admitted a balance to be due, without stating the amount, that this would take the case out of the statute of limitations, so as to entitle the plaintiff to nominal damages ^e. And

^a On this statute it has been holden, that an acknowledgment signed by the agent of the debtor, will not revive a debt barred by the statute of limitations: It must be signed by the debtor himself. *Hyde v. Johnson*, 2 Bing. N. R. 776. 3 Scott, 289. 2 Hodges, 94. S. C.

^b § 2.

^c § 10.

^d *Hilliard v. Lenard*, 1 Moody & M. 297. per *Ld. Tenterden*, Ch. J. *Ansell v. Ansell*, 3 Car. & P. 563. 1 Moody & M. 299. S. C. per *Ld. Tenterden*, Ch. J. *Towler v. Chatterton*, 3 Moore & P. 619. 6 Bing. 258. *Wilk. Stat. Lim.* 146. S. C. and see *Anner v. Cattell*, 5 Bing. 208.

2 Moore & P. 367. S. C. 3 Car. & P. 564. (b.) 1 Moody & M. 299, 300. in *notis*. *Wilk. Stat. Lim.* 143, &c. S. C. *Lockley v. Maund*, 2 Leg. Obs. 285, 6. in Chan. But the *sixth* section of the above statute, as to representations of character, not having a retrospective operation, it has been holden, that an action commenced before the first of *January 1829*, but tried after that day, on such a representation, made by *parol* before the passing of the statute, is maintainable. *Fellows v. Williamson*, 1 Moody & M. 306. per *Ld. Tenterden*, Ch. J.

^e *Dickenson v. Hatfield*, 5 Car. & P. 46. 2 Moody & M. 141. S. C.

a promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt more than *six* years old, is a sufficient compliance with the provisions of the 9 Geo. IV. c. 14. § 1. to take the case out of the statute of limitations, though no amount is specified in the promise; and a plaintiff, suing on such promise, is not confined to nominal damages, but may recover the whole of such proportion, upon proving the amount by extrinsic evidence^a. So, where an administratrix sued for a debt due to the intestate, and it appeared that the debt accrued more than *six* years before the commencement of the action, but that, within *six* years, the defendant and the agent of the administratrix went through the account together, and struck a balance, which the defendant promised to pay as soon as he could; it was holden, that, though the promise was not in writing, the administratrix was entitled to recover, on an account stated with her, and that the statute of limitations was no bar^b. But where letters had been written by the defendant to a friend of the plaintiff, stating that the plaintiff's claim, with that of others, should receive that attention which, as an honourable man, the defendant considered them to deserve, and that it was his intention to pay them, but he must be allowed time to arrange his affairs, and if he were proceeded against, any exertion of his would be rendered abortive; this was holden not to be an unqualified acknowledgment, from which the court could imply a sufficient promise to pay, to take the case out of the statute^c. So where a defendant, by a deed, reciting that he was indebted to the plaintiff and others, assigned his property to the plaintiff, in trust to pay all such creditors as should sign the schedule of debts annexed, provided that if all did not sign, the deed should be void, but the plaintiff never signed, nor was the amount of his debt stated; the court held, that this was not a sufficient acknowledgment, to take the plaintiff's debt out of the statute of limitations, although it was admitted orally, that he had but one debt^d. So it has been holden, that a debt, bearing interest, is not taken out

^a *Lechmere v. Fletcher*, 1 Crompt. & M. 623. 3 Tyr. Rep. 450. S. C. And for other instances, in which a subsequent acknowledgment, or promise, has been deemed sufficient to take a case out of the statute of limitations, see *Dabbs v. Humphries*, (or *Humphrey*), 10 Bing. 446. 4 Moore & S. 285. S. C. *Dodson v. Mackey*, 4 Nev. & M. 327.

^b *Smith v. Forty*, 4 Car. & P. 126. *per Vaughan, B.*

^c *Fearn v. Lewis*, 4 Moore & P. 1. 6 Bing. 349. 4 Car. & P. 173. S. C. and see *Cory v. Bretton*, 4 Car. & P. 462. *per Tindal, Ch. J.* *Brigstocke v. Smith*, 1 Crompt. & M. 483. 3 Tyr. Rep. 445. S. C. *Linsell (or Linley) v. Bonsor*, 2 Bing. N. R. 241. 2 Scott, 399. 1 Hodges, 305. S. C.; but see *Evans v. Heathcote*, 1 Leg. Obs. 398. K. B.

^d *Kennett v. Milbank*, 8 Bing. 38. 1 Moore & S. 102. S. C. *Edmunds v.*

of the statute of limitations, by an engagement, signed by the debtor, to charge his estate with a sum corresponding in amount with the debt, and interest from the date of the engagement^a. When a written promise to pay a debt, barred by the statute of limitations, has been lost, oral evidence of the contents of the writing, may be given^b. But it has been doubted, whether the date of an acknowledgement of a debt made in writing, pursuant to Lord *Tenterden's* act, can be proved by extrinsic oral evidence^c.

Effect of part
payment of
principal, or in-
terest.

In order to take a case out of the statute of limitations, by a part payment, it must appear that the payment was made on account of the debt for which the action is brought, and that it was made as part payment of a larger debt^d: And a verbal acknowledgement of the payment of part of a debt, within *six* years, is not sufficient for that purpose^e. But a supply of goods, in pursuance of an agreement to deliver them in diminution of a previous debt, is a sufficient part payment, to take the debt out of the statute of limitations^f. And where the payment of a sum of money is proved as a fact, and not by a mere admission, its appropriation to a particular account, whether in respect of principal or interest, may be shewn by declarations of the party making the payment; and such declarations need not have been at the time of such payment^g. So, where a testator bequeathed to his two daughters £250 each, to be paid when they arrived at the age of twenty-one, and till that period, the expenses of board, clothes, and education to be borne and paid by his executors; and he appointed executors, and also trustees, with all necessary powers to fulfil the will: At a meeting of the trustees and executors, for the purpose of settling the testator's affairs, the executors paid over to the trustees, *inter alia*, the sum of £500, to be

Downes, 4 Tyr. Rep. 173. 2 Crompt. & M. 459. S. C. and see *Emery v. Day*, 1 Crompt. M. & R. 245. 4 Tyr. Rep. 695. S. C.

^a *Martin v. Knowles*, 1 Nev. & M. 421. And for other cases, in which a subsequent acknowledgment, or promise, will not take a case out of the statute of limitations, see *Wilby v. Henman*, 4 Tyr. Rep. 967. 2 Crompt. & M. 658. S. C. *Paddon v. Bartlett*, 4 Nev. & M. 321.; but see *id.* 324, b. (b). 5 Nev. & M. 383. 1 Har. & W. 477. S. C. *Reeves v. Hearne*, 1 Meeson & W. 323.

^b *Haydon (or Eden) v. Williams*, 4 Moore & P. 811. 7 Bing. 163. S. C.

^c *Edmunds v. Downes*, 4 Tyr. Rep. 173. 2 Crompt. & M. 459. S. C.

^d *Tippets v. Heane*, 1 Crompt. M. & R. 252. 4 Tyr. Rep. 772. S. C. and see *Linsell (or Linley) v. Bonsor*, 2 Bing. N. R. 241. 2 Scott, 399. 1 Hodges, 305. S. C.

^e *Willis v. Newham*, 3 Younge & J. 518.

^f *Hart v. Nash*, 1 Gale, 171. 2 Crompt. M. & R. 337. S. C. *Hooper (or Cooper) v. Stevens*, 1 Har. & W. 480. 5 Nev. & M. 635. 7 Car. & P. 260. S. C.

^g *Waters v. Tompkins*, 1 Tyr. & G. 137. 2 Crompt. M. & R. 723. 1 Gale, 323. S. C.

set apart for the payment of the legacies to the daughters, when they attained the age of twenty-one; this sum was afterwards lent by the trustees to the defendant, on a promissory note, which described them "as trustees acting under the will of the late Mr. W. B." (the testator); and the court, under these circumstances, held that a payment of principal and interest to one of the legatees, within *six* years, was sufficient to take the case out of the statute of limitations, and that the trustees had a right to maintain an action on the note^a. So where A. and B. had signed a promissory note, by which they promised, "as churchwardens and overseers," to pay to C. or order a sum of money with interest, which sum was in fact the amount of a loan made by C. for the use of the parish, it was holden that the payment of interest on such note, from time to time, by the *vestry*, was a sufficient acknowledgment of the debt, to take the case out of the statute of limitations^b: *A fortiori*, where B. had audited the parish accounts, in which payments of interest on the note were entered^b. But proof of a payment of 12*s.* as *interest* money, does not justify a verdict, finding a debt of £13 16*s.*^c. And where to a declaration, stating that the defendant had, *sixteen* years before, made and delivered his promissory note payable on demand, with *interest*, to the plaintiff, but neglected to pay, except interest, which he paid up to a day within *six* years, the defendant pleaded that the cause of action did not accrue within *six* years, the court held the plea to be sufficient^d.

The payment, within *six* years, of *interest* due upon a note beyond that period, where the note remains in the hands of the payee, is sufficient to take the case out of the statute of limitations^e: and payment of interest on a promissory note to an administrator, who had omitted to take out administration in the diocese in which the note was *bonum notabile*, was holden to be a sufficient acknowledgment of the debt, to defeat a plea of the statute of limitations^f. So, payment of interest, by one of several drawers of a joint and several promissory note, will take the case out of the statute, as against any of the other drawers, in a separate action on the note against him^g; and the sta-

In action on promissory note.

^a Megginson v. Harper, 2 Crompt. & 121. S. C.
^b M. 322. 4 Tyr. Rep. 94. S. C.
^c Crew v. Petit, 3 Nev. & M. 456.
^d Leeson v. Smith, 4 Nev. & M. 304.
^e Hollis v. Palmer, 2 Bing. N. R. 713.
^f Bealey v. Greenslade, 1 Price, N. R. 144. 2 Crompt. & J. 61. 2 Tyr. Rep.
^g 121. S. C.
^h Clarke v. Hooper, 10 Bing. 480. 4 Moore & S. 353. S. C.
ⁱ Whitcomb v. Whiting, Doug. 652, 3. Burleigh v. Stott, 8 Barn. & C. 36. 2 Man. & R. 93. S. C. Chippendale v. Thurston, 4 Car. & P. 98. 1 Moody &

tute 9 Geo. IV. c. 14. § 1. has not altered the law in this respect^a. In a *joint* action against several drawers of a promissory note, it was formerly holden, that an acknowledgment, within *six* years, by one of them, would revive the debt against another, although the latter had made no acknowledgment, and only signed the note as a surety^b. And where *A.* and *B.* had given a joint promissory note for £600 to *C.* an account, in which *B.*, as between himself and *C.*, gave credit for interest upon a sum of £600, was deemed evidence, in an action by *C.* against *A.* and *B.*, to take the case out of the statute of limitations^c.

Indorsement of payment on bond, or promissory note, &c. when not admissible in evidence.

In order to prove the payment of interest, or a part of the principal, an indorsement made by the obligee upon the bond, within *twenty* years, was formerly allowed to be evidence^d; but an indorsement made after the presumption had taken place, was not admissible^d: And now, by the statute 9 Geo. IV. c. 14. ^e "no indorsement or memorandum of any payment, written or made after the time appointed for that act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the acts therein recited." By another clause of the same statute^f, "the said recited acts, and that act, shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set off, on the part of any defendant, either by plea, notice, or otherwise." Where a plea of set off stated, that the plaintiff made his promissory note, payable to *A. C.*, which was duly indorsed, and delivered to the defendant, after *A. C.*'s death, by his administrator, and was

Case of simple contract debt, alleged by way of set off.

M. 411. S. C. *per Parke, J.* Pease v. Hirst, 10 Barn. & C. 122. 5 Man. & R. 88. S. C. Wyatt v. Hodson, 8 Bing. 309. and see Fenton v. White, 1 Leg. Obs. 383. *per Garrow, B.*; but see Wyld v. Porter, 1 Ad. & E. 742.

^a Chippendale v. Thurston, 4 Car. & P. 98. 1 Moody & M. 411. S. C. *per Parke, J.* In this case, the interest was one of the *items* in an account, of which the party had paid the balance; which was ruled to be a sufficient payment of interest: but see Willis v. Newham, 3 Younge & J. 518.

^b Tidd Prac. 9 Ed. 23; but the law in this respect is now altered, by the statute 9 Geo. IV. c. 14. *Ante*, 9, 10.

^c Manderston v. Robertson, 4 Man. & R. 440. and see *Id.* 447. (a.) Wheatley v. Williams, 1 Meeson & W. 533.

^d Tidd Prac. 9 Ed. 19. and see Parr v. Crotchett, Stark. Evid. Append. 2 Ed. 1083. Gleadow v. Atkin, 1 Crompt. & M. 410. 3 Tyr. Rep. 289. S. C. Smith v. Battens, 1 Moody & R. 341. *per Taunton, J.*

^e § 3.

^f § 4.

unpaid; to which the plaintiff replied, that the supposed cause of set off on the said note, did not accrue to the defendant within *six* years, in manner and form, &c., the court held, that this replication admitted, not only the making of the note, but the indorsement of it to the defendant by *A. C.*'s administrator; and that the defendant might, therefore, avail himself of *memorandums* of the payment of interest, written on the note by *A. C.*, before Lord *Tenterden's* act, to bar the statute of limitations^a.

When there are several *items* in an account, some of which accrued within the last *six* years, and others beyond that period, the statute of limitations will be a bar to the recovery of the latter *items*; and the former will not take the case out of the statute of limitations, unless the account is mutual, or the *items* are so connected together; as necessarily to form the subject of one action: Therefore, where the plaintiff, a proctor, sued the defendant for the amount of his bill, which was principally for work done in prosecuting an appeal to judgment, more than *six* years before the commencement of the action, but after the judgment, a communication had been made by the adverse party to the plaintiff, as proctor, and attended to by him, respecting the costs, within *six* years, and an *item*, in respect of this transaction, was added to the plaintiff's bill; the court held, that the latter *item* did not take the case out of the statute of limitations^b. It was formerly holden, that if there were a mutual account of any sort between the plaintiff and defendant, for any *item* of which credit had been given within *six* years, that was evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as to take the case out of the statute^c. But, since Lord *Tenterden's* act^d, it has been decided, that the fact of there being cross demands between the parties, unaccompanied by a written statement of accounts, or evidence that the subject of one demand was given and accepted in reduction of the other, is insufficient to take the case out of the statute of limitations, on a replication of a promise within *six* years^e.

When there are mutual accounts.

^a *Gale v. Capern, (or Capron)* 1 Ad. & E. 102. 3 Nev. & M. 863. S. C.

^b *Rothery v. Munnings*, 1 Barn. & Ad. 15.

^c *Castling v. Skoulding*, 6 Durnf. & E. 189. 1 Wms. Saund. 127. c. S. C. and see *Moore v. Strong*, 1 Hodges, 28. 1 Bing. N. R. 441. 1 Scott, 367. S. C. And for cases of promises or acknowledgments, before Lord *Tenterden's* act, and when

they were sufficient, or not, to take the case out of the statute of limitations, see *Tidd. Prac.* 9 Ed. 22, &c. 3 Chit. Blac. Com. 306. (a.) & Wilk. Stat. Lim. Chap. IV. V. VI. VII.

^d 9 Geo. IV. c. 14. § 1.

^e *Williams v. Griffith*, 1 Gale, 65. 2 Crompt. M. & R. 45. 5 Tyr. Rep. 748. S. C.

Means of commencing actions, formerly necessary, to take case out of the statutes.

Abolished by stat. 2 W. IV. c. 39.

Writs substituted in lieu thereof.

Writs of summons and *capias* may be continued by *alias* and *pluries*.

What must be done thereon, to prevent operation of statutes.

In order to shew that an action was commenced in due time, so as to take the case out of the statutes of limitations, it was formerly necessary to sue out an *original writ*, in the King's Bench or Common Pleas, which was the only mode of proceeding against *peers* of the realm, *corporations*, or *hundredors*^a; or to sue out a bill of *Middlesex* or *latitat*, in the King's Bench, or *capias quare clausum fregit* in the Common Pleas, which was as effectual for this purpose as an original writ^b: and suing out a *testatum capias ad respondendum* was a good commencement of an action by *original*^b. In the Exchequer, it was necessary to sue out a *venire facias*, *subpoena*, or *quo minus capias ad respondendum*^c. In actions against members of the House of Commons, an *original writ* must have been sued out at common law, or a *bill* filed, after the statute 12 & 13 W. III. c. 3. § 2^d. In actions at the suit of *attornies*, it was usual to sue out an attachment of *privilege*, in the King's Bench^e, or Common Pleas^f; or *venire facias*, or *capias* of privilege, in the Exchequer^g: and a *bill* must have been filed against *attornies*^h, or *prisoners* in actual custody of the marshalⁱ. But now, by the uniformity of process act^k, the above means of commencing personal actions in the superior courts of law at *Westminster*, as well as the distinctions between proceedings by *original writ* and by *bill*, are abolished; and writs of *summons*, *capias*, and *detainer*, are substituted in lieu thereof, and declared to be the only writs for the commencement of personal actions, in any of the courts aforesaid, in the cases to which such writs are applicable^l. The writs of *summons*, and of *capias*, however, may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon, or served therewith^m: But it is provided, that "no first writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or toward outlawry shall be had thereupon; or unless such writ, and every writ, (if any,) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of recordⁿ, within one calendar month next after the expiration thereof, including the day of such expiration; and unless

^a Tidd *Prac.* 9 Ed. 102.

^b *Id.* 27.

^c *Id.* 155.

^d *Id.* 116, &c.

^e *Id.* 819.

^f *Id.* 320.

^g *Id.* 92. 321.

^h *Id.* 92. 321. 323. 325.

ⁱ *Id.* 91. 353, &c.

^k 2 W. IV. c. 39.

^l § 21.

^m § 10.

ⁿ For the form of an entry of a writ of *summons*, with the return of *non est in-*

"every writ, issued in continuation of a preceding writ, shall be
"issued within *one* such calendar month after the expiration of the
"preceding writ, and shall contain a *memorandum* indorsed thereon,
"or subscribed thereto, specifying the day of the date of the first
"writ; and^a return to be made, in bailable process, by the sheriff, or
"other officer to whom the writ shall be directed, or his successor in
"office; and in process not bailable, by the plaintiff or his attorney
"suing out the same, as the case may be."

In this *proviso* three cases are mentioned, in which the first writ shall be valid: first, if it be served; secondly, if proceedings to outlawry be had thereon; thirdly, if the writ be returned *non est inventus*, and entered of record within one calendar month^b: But it is not necessary, in order to prevent the operation of the statute of limitations, by a series of writs, under the above *proviso*, that there should be any attempt to serve the first writ^c. This *proviso* is confined in its operation to cases where it is intended to save the statute of limitations: and therefore, where a *capias* was issued against two defendants, one of whom was arrested, and put in bail before the expiration of the *four* months which the writ had to run, and the other defendant could not be arrested during that period; the proceedings were holden to be regular, although the first writ had not been returned, nor any continuance entered, and the second writ was not issued within one calendar month after the first had expired^d. Where a writ of *summons*, tested in time to save the statute of limitations, was resealed, in consequence of an alteration in the description of the defendant, and the county in which he resided, and was not served until after the *six* years had expired; the court held, that the resealing did not amount to a re-issuing of the writ, and that it was not necessary for the plaintiff to shew when the resealing took place^e.

Nature of *proviso*, and decisions thereon.

The uniformity of process act, however, does not extend to any cause removed into either of the superior courts, by writ of *pone*,

Stat. 2 W. IV. c. 39. does not extend to inferior courts.

venius by the plaintiff or his attorney, and award of *alias*, to save the statute of limitations, see Append. to Tidd *Sup.* 1833. p. 252; and for the entry of a writ of *capias*, with the sheriff's return of *non est inventus*, and award of *alias capias*, *id.* 254.

^a *Sic*, in printed copy of act, instead of *such*, as in the bill.

^b *Williams v. Roberts*, 1 Gale, 56. *per* *Ld. Abinger*, Ch. B.

^c *Id. ib.* 1 *Cromp. M. & R.* 676. 5 *Tyr. Rep.* 421. 3 *Dowl. Rep.* 512. 10 *Leg. Obs.* 47. S. C.

^d *Nicholson v. Leman*, (*Lemon, or Rowe*,) 2 *Dowl. Rep.* 296. 4 *Tyr. Rep.* 308. 2 *Cromp. & M.* 469. 8 *Leg. Obs.* 59. S. C.

^e *Braithwaite v. Ld. Montford*, 2 *Cromp. & M.* 408. 4 *Tyr. Rep.* 276. S. C.

certiorari, recordari facias loquelam, habeas corpus, or otherwise^a: and therefore, if a plaint be levied in an inferior court in due time, and then it be removed into the King's Bench by *habeas corpus*, and the plaintiff declare there *de novo*, and the defendant plead the statute of limitations, the plaintiff may reply, and shew the plaint in the inferior court, and that will be sufficient to avoid the statute^b.

Notice of
action.

To excise
officers, &c.

Previously to the commencement of an action, a *notice* is in some cases required to be given to the party or parties against whom it is intended to be brought, in order to give them an opportunity of tendering amends^c. Thus, by the statute 7 & 8 Geo. IV. c. 53.^d

"no writ, summons, or process, shall be issued out against or served upon, nor shall any action be brought, raised, or prosecuted against any officer of excise, or any person employed in the revenue of excise, or any person acting in the aid and assistance of any such officer or person so employed as aforesaid, for any thing done in pursuance of that act, or any other act or acts of parliament relating to the revenue of excise, until after the expiration of one calendar month next after notice in writing shall have been delivered to such officer or person as aforesaid, or left at the usual place of his abode, by the attorney or agent of the person or persons who shall intend to sue out such writ or process, or to bring, raise, or prosecute such action as aforesaid; in which notice shall be clearly and explicitly contained and set forth the cause of such action, the time when and the place where such cause of action arose, the name and place of abode of the person or persons in whose name or names such action or suit is intended to be brought, and the name and place of abode of the attorney or agent." And by s. 118, it is provided, that "no such plaintiff or plaintiffs shall, on the trial of any such action or suit, be permitted to produce any evidence of any cause of action, except such as shall be contained and set forth in such notice as aforesaid; nor shall recover any verdict against any such officer or person, unless it shall be proved, on the trial of such action or suit,

^a Stat. 2 W. IV. c. 89 § 19. and see *Dod v. Grant*, 6 Nev. & M. 70.

^b *Tidd Prac.* 9 Ed. 27, 8.

^c *Id.* 28. And for the forms of notices of action to *justices of the peace*, and *custom-house*, or *excise* officers, see Appendix thereto, p. 1, &c.

^d § 114. For notices of action required to be given by previous statutes, to

justices of the peace, &c., officers of *customs or excise*, officers of the *army, navy, or marines, &c.*, treasurer of *West India*, or *London Dock* company, *spiritual persons*, for nonresidence, and *commissioners of bankrupts*; and for things done in pursuance of the *building act*, or acts relating to *taxes*, or *larceny, &c.*, see *Tidd Prac.* 9 Ed. 28, &c.

"that such notice was given." In an action against *excise* officers, for a seizure, the notice of action must be proved in the first instance, before any other evidence is given^a. And where the plaintiffs slept at different houses, away from their place of business, but a servant slept at the latter place, it seemed that the place of business might properly be described in the declaration, as a dwelling-house of the plaintiffs^a: but it was doubted, whether the notice of action properly described the plaintiffs as of their place of *business*, the statute requiring it to state their place of *abode*^b.

By other acts of parliament, a notice of action is required to be given to persons acting under them, previously to its commencement; as a notice of *forty-two* days, by the court of requests act for *London*^c; a notice of *one calendar* month by the *metropolitan* police act^d; a notice of *twenty-one* days by the *new street* act^e, and the *poor law* amendment act^f; a notice of *fourteen* days, by the act for regulating the *watermen* and *lightermen* of the river *Thames*^g, &c., and the act relating to the cruel and improper treatment of animals^h, &c.; a notice of *ten* days, by the court of requests act for *Westminster*ⁱ; and a notice of *seven* days, by the act relating to the making and sale of *bread*^k.

To other persons.

In cases where no previous notice of action is required by statute, it is usual for the plaintiff's attorney to write a *letter* to the defendant, informing him of the cause of action, and, if for a debt, requesting payment of it. Formerly, no charge was allowed for such a letter, on taxing costs, to the attorney for the plaintiff, against the defendant; but the propriety of encouraging this preliminary step has of late induced a contrary practice^l; and in a recent case it was determined, that an attorney is entitled to his costs for writing a letter, demanding a debt from a defendant; and that he may proceed in the action, unless the same be paid, even after payment of the debt, before a writ was issued^m. The fee now usually allowed for a letter, if sent, before action brought, when the claim exceeds £20, is 3s. 6d.; but when it is

Attorney's letter.

^a Johnson v. Lord, 1 Moody & M. 444.
per Ld. Tenterden, Ch. J.

^b *Id.* *ib.*

^c 5 & 6 W. IV. c. xciv. § 63.

^d 10 Geo. IV. c. 44. § 41.

^e 57 Geo. III. c. xxix. § 136.

^f 4 & 5 W. IV. c. 76. § 104.

^g 7 & 8 Geo. IV. c. lxxv. § 93.

^h 5 & 6 W. IV. c. 59. § 19.

ⁱ 6 & 7 W. IV. c. cxxxvii. § 85.

^k 3 Geo. IV. c. cvi. § 29.

^l 2 Chit. Gen. Pr. 56. And for the preliminary steps in general, to be taken before the commencement of the action, see 3 Chit. Gen. Pr. 114, &c.

^m Morrison v. Summers, 1 Barn. & Ad. 559. 1 Dowl. Rep. 325. 1 Leg. Obs. 77, 8. S. C. and see Boswell v. Norman, 1 Leg. Obs. 126. 159. 410. S. C.

under that amount, 2*s.* only are allowed for it, according to the reduced scale of costs, prescribed by the *directions* to taxing officers, which commenced operation on the 15th of *March* 1834^a.

Tender of debt,
&c

When the action is well founded, it is advisable for the defendant, as a precautionary measure^b, to make a legal tender of the *debt* admitted to be due, or of *damages*, when allowed to be pleaded, as in the case of a negligent or involuntary trespass, or in actions against justices, &c.

In money, or
bank notes, &c.

Before the statute 3 & 4 W. IV. c. 98., the tender should regularly have been made in lawful money of *England*; which is of two sorts, viz. *English* money, coined by the King's authority, or *foreign* coin, made current by his royal proclamation within the realm^c: the latter was considered as a good tender^d: and though bank notes were not made a legal tender, by the statute 37 Geo. III. c. 45^e, yet a tender in bank of *England*, or country bank notes, was good, unless specially objected to on that account at the time^f. The same doctrine was applied to a draft on a banker^g: and in one case it was holden, that a tender in a *Liverpool* bank bill of exchange was good, if not specially objected to^h; but, in a subsequent case, the tender of a *Bristol* bank bill was holden not to be good, although the party made no objection as to the form of the tenderⁱ. And now, by the statute 3 & 4 W. IV. c. 98. § 6, it is enacted, that "from and after "the 1st day of *August* 1834, unless and until parliament shall otherwise direct, a tender of a note or notes of the Governor and Company of the Bank of *England*, expressed to be payable to bearer on "demand, shall be a legal tender, to the amount expressed in such

By stat. 3 & 4
W. IV. c. 98.

^a 2 Dowl. Rep. 485. Chapm. K.B. 3 Addend. 132.

^b This is one of the precautionary measures recommended to be adopted by Mr. Chitty, in his excellent treatise on the Practice of the Law, Chap. V. p. 506.; and see his note on the subject of tender, 3 Chit. Blac. Com. 303.

^c Co. Lit. 207.

^d *Wade's case*, 5 Co. 114. b.

^e *Grigby v. Oakes*, 2 Bos. & P. 526. and see stat. 56 Geo. III. c. 68. § 11., by which gold coin was declared to be the only legal tender.

^f *Wright v. Reed*, 3 Durnf. & E. 554. *Brown v. Saul*, 4 Esp. Rep. 267. per *Ld. Ellenborough*, Ch. J. *Saunders*

v. Graham, Gow, 121. per *Dallas*, Ch. J. *Polglass v. Oliver*, 2 Crompt. & J. 15. 2 Tyr. Rep. 89. 1 Price N. R. 138. S. C.

^g Per *Buller*, J. in *Wilby v. Warren*, Sit. Mid. after M. T. 28 Geo. III. K. B. *Tidd Prac.* 9 Ed. 187. (m.)

^h *Lockyer v. Jones, Peake* Cas. Nl. Pri. 180. n.

ⁱ *Mills v. Safford*, *id. ib.* and see *Polglass v. Oliver*, 2 Crompt. & J. 15. 2 Tyr. Rep. 89. S. C. And for the doctrine of tender in general, and in what cases it is, or is not allowed, at common law, or by statute; at what time, by and to whom, and in what manner it should be made; and when and how it should be pleaded &c., see *Tidd Sup.* 1830, p. 10, &c.

“ note or notes ; and shall be taken to be valid, as a tender to such
“ amount, for all sums above *five* pounds, on all occasions on which
“ any tender of money shall be legally made, so long as the Bank of
“ *England* shall continue to pay on demand their said notes in legal
“ coin. Provided always, that no such note or notes shall be deemed
“ a legal tender of payment, by the Governor and Company of the
“ Bank of *England*, or any branch bank of the said Governor and
“ Company : but the said Governor and Company are not to be-
“ come liable, or be required to pay and satisfy, at any branch bank
“ of the said Governor and Company, any note or notes of the said
“ Governor and Company, not made specially payable at such branch
“ bank ; but the said Governor and Company shall be liable to pay
“ and satisfy, at the bank of *England* in *London*, all notes of the said
“ Governor and Company, or of any branch thereof.”

CHAP. II.

Of the JUDGES of the SUPERIOR COURTS of LAW at WESTMINSTER, and their SUMMARY JURISDICTION, and POWER of making GENERAL RULES, &c. : and of the OFFICERS of the COURTS, and their FEES; TERMS, and RETURNS, &c.

IN the present Chapter it is intended to notice, first, the appointment of additional *puisne* judges in the superior courts of law at *Westminster*, and Common Pleas at *Lancaster*, and the manner in which business is conducted in the bail court, in the King's Bench; secondly, the *summary* jurisdiction of the judges, at common law, or by statute; thirdly, their power to make general rules for regulating their proceedings, and the rules made by them in pursuance thereof; fourthly, the extension of their jurisdiction to *Chester* and *Wales*; fifthly, the separation of the palatine jurisdiction from the bishoprick of *Durham*, and vesting it in the crown; sixthly, the opening of the court of Common Pleas to the counsel of the other courts, by abolishing the exclusive privileges of *serjeants* at law; seventhly, the officers of the courts, their duties, and fees, &c.; and lastly, the alterations made in the terms and returns of writs, and respecting holidays, &c.

Judges of King's Bench, and Common Pleas.

There were formerly *four* judges only of the courts of King's Bench and Common Pleas, *viz.*, the Lord Chief Justice, created by writ, and three *puisne* judges, created by letters patent; who, by the statute 12 & 13 W. III. c. 2, hold their places, *quamdiu se bene gesserint*, and not, as anciently, *durante bene placito*. In the court of Exchequer, the judges were the Chief Baron, and three *puisne* barons, who are created by letters patent^a, and were formerly barons and peers of the realm^b. In addition to these judges, it was enacted by the statute 11 Geo. IV. & 1 W. IV. c. 70^c, that "whenever his Majesty should be pleased to appoint an additional *puisne* judge, to either of his courts of King's Bench, Common Pleas, and Exche-

Barons of Exchequer.

Additional *puisne* judges.

^a Mad. Exchey. 582. 4 Inst. 117. Ed. 39.

^b 4 Inst. 103. *in marg.* and see Com. ^c § 1.

Dig. tit. Courts, D. 10. Tidd Prac. 9

"quer, the *puisne* judges of such court should sit by *rotation* in each term, or otherwise, as they should agree among themselves, so that no greater number than *three* of them should sit at the same time in *banc*, for the transaction of business in term, unless in the absence of the Lord Chief Justice, or Lord Chief Baron: and that it should and might be lawful for any one of the judges of either of the said courts, when occasion should so require, while the other judges of the same court were sitting in *banc*, to sit apart from them, for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motions, and making rules and orders in causes and business depending in the court to which such judge should belong, in the same manner, and with the same force and validity, as might be done by the court sitting in *banc*": And every judge of the said courts, to whatever court he may belong, shall be, and he is thereby accordingly authorized to sit in *London* and *Middlesex*, for the trial of issues arising in any of the said courts; and to transact such business, at chambers or elsewhere, depending in any of the said courts, as relates to matters over which the said courts have a common jurisdiction, and as may, according to the course and practice of the court, be transacted by a single judge." ^b In pursuance of this statute, an additional *puisne* judge was, in *Michaelmas* term 1830, appointed by his present Majesty, to each of his courts of King's Bench, Common Pleas, and Exchequer ^c; and it has ever since been usual, during term, for one of the *puisne* judges of the court of King's Bench to sit apart from the other judges, in a court adjoining thereto, commonly called the *bail* court ^d, or, from the general nature of its business, the *practice* court, for adding and justifying bail, and other purposes of the act. It has also been usual for the *puisne* judges of the King's Bench to perform this duty by *rotation*, and for the same judge to continue in the performance of it during the whole term.

The business in the *bail* court, which formerly commenced at half past *nine* o'clock ^e, and now commences at *ten* in the morning ^e, is thus arranged: At the sitting of the court, the oaths are administered to, and declarations received from official persons, barristers, and attorneys; then follows the justification of bail; immediately after

One to sit apart, for adding or justifying bail, &c.

Every judge may sit in *London* and *Middlesex*, for trial of issues, and to transact business at chambers, &c

Appointment of additional *puisne* judges.

Bail or practice court, in K. B.

Arrangement of business therein.

^a For the salaries and retirement allowances, to additional judges, see stat. 11 Geo. IV. & 1 W. IV. c. 70. § 2, 3.

^b § 4, and see 1 Rep. C. L. Com. 27. *Phillips v. Drake*, 2 Dowl. Rep. 45.

^c 1 Barn. & Ad. 377. 7 Bing. 234. 4

Moore & P. 721. 1 Crompt. & J. 285.

^d For the origin of the bail court, see Tidd *Prac.* 9 Ed. 262, 3. Stat. 57 Geo. III. c. 11.

^e H. 59 Geo. III. K.B. *per* Bayley, B and see 1 Chit. R. 1. (a.)

which, (except on *Mondays* and *Thursdays*, when the hearing of the insolvents brought up under the Lords' Act, and on *Tuesdays* and *Fridays*, when the calling over of the *common* paper is interposed between the justification of bail and the motions,) the judge goes through the bar twice, beginning each time with the *senior* barrister, and disposing, in his going through the bar the first time, of applications for rules *nisi*, and rules absolute in the first instance, or upon no cause being shewn; and in his doing so the second time, hearing such contested and other motions, as may be submitted to his decision. The *peremptory* paper, if any, is then called over: This paper consists of a selection made by the clerk of the rules, at his discretion, from the rules enlarged from a former term: After the *peremptory* paper is disposed of, or, if there should be no *peremptory* paper, after the judge has gone through the bar the second time, he calls upon the bar again in their order, and continues to hear motions generally, if there should happen to be enough to occupy the time on *nisi prius* days, until the assembling of the jury; and on other days, until the chamber business, which commences in *Serjeant's Inn* at three o'clock in the afternoon, requires his attendance at that place^a.

No separate practice court in C. P. or Exchequer.

Practical business, how transacted therein.

In the Common Pleas and Exchequer, there is no separate court or place appointed, as in the King's Bench, for business to be transacted before a single judge. In the Common Pleas, it is usual for one of the *puisse* judges to attend in court, at a quarter before ten o'clock in the morning, during term, to take justifications of bail, &c.; but the whole of the practical business is at present usually transacted before all the judges, or such of them as are present, in full court. In the Exchequer, one of the *puisse* barons attends in court at ten o'clock every morning during term, except on the last day, when he sits in the Exchequer chamber, for the purpose of administering oaths, and taking justifications of bail, and such motions as may be brought before him: And, by a late regulation^b, bail must be in attendance at the sitting of the court at ten o'clock, except on the first and last days of term; when they may be justified at any time during the sitting of the court.

Effect of rules and orders, made by a single judge.

The rules and orders made by a single judge, in causes and business depending in the court to which he belongs, are declared by the act, to have the same force and validity as if made by the court sitting in *banc*^c: And where a rule *nisi* was obtained for an attachment against a defendant, for nonpayment of money pursuant to an award, and on argument in the bail court, the judge there made the

^a Chapm. K. B. 2 Ed. 76, 7. 1 Leg.

Obs. 411, 12, and see 3 Chit. Gen. Pr. 14, 15.

^b 1 Crompt. & J. 467. and see 3 Price, 591. Price, Excheq. Prac. 69.

^c *Ante*, 23.

rule absolute, and the sheriff levied for the amount claimed; after which a rule was obtained, calling on the sheriff to shew cause, among other things, why he should not retain the sum levied till further order of the court; and upon such rule being discussed in the full court, it was admitted that the object in applying for the rule was to obtain a revision of the judgment given in the bail court; it was holden that the matter, having been decided by a judge in the latter court, ought not now to be re-heard; and that the proceedings since the attachment, did not entitle the defendant to re-open it^a.

In the Common Pleas at *Lancaster*, by a late statute^b, for improving the practice and proceedings in that court, reciting that it would tend to further the administration of justice, if more of the judges of the superior courts at *Westminster* were appointed justices for all manner of pleas within the county palatine of *Lancaster*, it is enacted, that "it shall and may be lawful for his Majesty, in right of his duchy and county palatine of *Lancaster*, from time to time to nominate and appoint all or any of the judges of the superior courts at *Westminster*, to be judges of the court of Common Pleas of the county palatine of *Lancaster*: Provided nevertheless, that the judges before whom the assizes for the said county palatine of *Lancaster* shall from time to time be held, and their respective officers, shall alone be entitled to the fees and emoluments heretofore received by the judges of the said county palatine, and their officers."

Appointment of
Judges, in
Common Pleas
at *Lancaster*.

The general jurisdiction of the superior courts of law at *Westminster*, in *personal* actions, having been fully treated of in the *ninth* edition of the *Practice*^c, it may be proper to notice, in this Chapter, some of the principal heads of their *summary* jurisdiction, at common law or by statute; with the power of the courts to make general rules for the regulation of their proceedings, and the rules made by them in pursuance thereof. At common law, the courts at *Westminster* have a *summary* jurisdiction over their own officers^d, and sheriffs^e, &c., who are to some purposes considered as their officers; and also over attorneys^f, and

Summary jurisdiction of superior courts.

Over their own officers, sheriffs, and attorneys, &c.

^a *Rex v. Sheriff of Devon*, 2 Ad. & E. 296. 5 Nev. & M. 416. (b.) S. C. and see *Rex v. Archbishop of York*, 3 Nev. & M. 453. 1 Ad. & E. 394. S. C. *Parks v. Edge*, 1 Crompt. & M. 429. 3 Tyr. Rep. 364. *Parker v. Ade*, 1 Dowl. Rep. 643. S. C. *Doe d. Poole, v. Errington*, 3 Nev. & M. 646. 671. per *Litdale*, J. 3 Chit. Gen. Pr. 44.

^b 4 & 5 W. IV. c. 62. § 24.

^c *Tidd Prac.* 9 Ed. 37, 8. And see further, as to the general jurisdiction of the superior courts of law at *Westminster*, 1 Rep. C. L. Com. 72, &c. 2 Chit. Gen. Pr. 311, &c.; and as to their summary jurisdiction, *id.* 327, &c.

^d *Tidd Prac.* 9 Ed. 38. *Sup.* thereto, 52, 3.

^e *Tidd Prac.* 9 Ed. 58, 306, &c.

^f *Id.* 85, &c.

Setting aside,
and staying, pro-
ceedings.

matters in difference between them and their artickled clerks^a. But the principal branch of the summary jurisdiction of the judges is that which they exercise over the proceedings in their own courts, in setting them aside, at the instance of the party, for irregularity^b; or staying them, when defective, as where the cause of action is frivolous, or the action brought or conducted upon insufficient grounds, contrary to good faith, or without proper authority^c. There are also other grounds for staying the proceedings at common law, not *absolutely*, but for a time, or until something be done for the benefit of the defendant: These are, pending a writ of error; until security be given for the payment of costs; or until the costs are paid of a former action for the same cause^d; or on payment of debt and costs^e. And where it appears that a warrant of attorney has been obtained by fraud, or misrepresentation, or for a corrupt and usurious consideration, &c., the courts will order it to be delivered up, and set aside the judgment, and proceedings, if any, which have been had under it^f.

Summary juris-
diction, by sta-
tute.

The courts have also a *summary* jurisdiction given them by *statute*, over the proceedings in particular cases; as on compounding *penal* actions, by the 18 Eliz. c. 5. § 3.^g; concerning informations upon *penal* statutes, by the 21 Jac. 1. c. 4. §. 1.^h; in actions for *bribery*, upon the clause of discovery, or if there has been any wilful delay in prosecuting the action, by the 2 Geo. II. c. 24ⁱ; and for penalties on acts relating to the *customs* or *excise*, by the 26 Geo. III. c. 77. § 13^k; respecting *lotteries*, by the 36 Geo. III. c. 104. § 38^k; and *stamp* duties, by the 44 Geo. III. c. 98. § 10.^l in actions on *bail* bonds, by the 4 Ann. c. 16 § 20^m; and on *replevin* bonds, by the 11 Geo. II. c. 19. § 23ⁿ. in *ejectment*, by landlord against tenant, on a clause of re-entry for non-payment of rent, &c. by the 4 Geo. II. c. 28. § 4.^o; or by a *mortgagee*, on the 7 Geo. II. c. 20. § 1., for the recovery of the possession of mortgaged premises, or, in *debt* on bond for the payment of mortgage money, or performance of covenants in the mortgage deed, when no suit in equity is depending for a foreclosure or redemption^p; and for punishing gaolers, bailiffs, and others employed in the execution of process, for extortion^q, &c., by the Lords' act, 32 Geo. II. c. 28. § 12.

^a Tidd *Prac.* 9 Ed. 68. 87, 8.

^b *Id.* 512, &c.

^c *Id.* 515, 16.

^d *Id.* 530, &c.

^e *Id.* 540, &c.

^f *Id.* 547.

^g *Id.* 556, 7.

^h *Id.* 517, 18.

ⁱ *Id.* 518.

^k *Id.* 519.

^l *Id.* 520.

^m *Id.* 298. 300. 303.

ⁿ *Id.* 1038, 9.

^o *Id.* 1234, 5.

^p *Id.* 1235.

^q *Id.* 232.

By the statute 8 & 9 W. III. c. 15. ^a "any arbitration or umpirage procured by corruption or undue means, may be set aside by any court of law or equity, so as complaint thereof be made, in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties." By the *annuity acts*, 17 Geo. III. c. 26^b, and 53 Geo. III. c. 141^c, the courts are authorized, in certain cases, to order every deed, bond, instrument, or other assurance, whereby an annuity or rent charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated. By the *speedy judgment and execution act*^d, they may order judgments, signed or recorded by virtue of that act, to be vacated, and executions issued thereon, to be stayed or set aside, and enter an arrest of judgment, or grant a new trial, or new writ of inquiry, as justice may appear to require. By the 13 Geo. III. c. 63. § 44, and 1 W. IV. c. 22 the courts are authorized to grant a *mandamus*, or commission, to examine witnesses in *India*, or the colonies, &c.^e: And by the *interpleader act*^f, they are enabled to give relief against adverse claims, made upon persons having no interest in the subject of such claims; and to sheriffs, and other officers, in execution of process against goods and chattels.

By stat. 8 & 9 W. III. c. 15. for setting aside awards.

By annuity acts.

By speedy judgment and execution act.

By other Acts.

It will next be proper to consider the power of the judges to make general rules, for the regulation of the proceedings in their own courts. These powers are of two kinds: first, such as are exercised by the judges of *each* of the superior courts over the proceedings therein; and secondly, such as are exercised by *all* the judges jointly, or any *eight* or more of them, in matters over which they have a common jurisdiction.

Power of judges to make general rules, for regulating proceedings in their own courts.

The judges of each of the superior courts of law at *Westminster* have an original and inherent jurisdiction and power of making general rules, for regulating their own proceedings; in the exercise of which power, general rules have been made by them, from time to time, as occasion has required. And there is a clause in the *uniformity of process act*^g, authorizing the judges of each of the said courts,

Power of judges of each court to make general rules, &c.

^a § 2. For the construction of this clause of the statute, and the cases decided thereon, see *Tidd Prac.* 9 Ed 840.

^b § 4. And for cases decided on this section of the statute, see *Tidd Prac.* 9 Ed. 522.

^c § 6. And for cases decided on this

clause, see *Tidd Prac.* 9 Ed. 525.

^d 1 W. IV. c. 7. *Post*, Chap. XXXIX.

^e *Post*, Chap. XXXV.

^f 1 & 2 W. IV. c. 58. and see *post*, Chap. XX. XLI.

^g 2 W. IV. c. 39. § 18.

Rules in Exchequer, of Mich. 1 W. IV.

from time to time, to make such rules and orders, for the government and conduct of the ministers and officers of their respective courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of that act, as such judges may think fit and reasonable; provided always, that no additional charge be thereby imposed on the suitors. In the exercise of the separate jurisdiction of the court of *Exchequer*, general rules were made by the barons of that court, in *Michaelmas* term 1830^a, which were principally occasioned by the admission of attornies of the King's Bench and Common Pleas, to practise in the Exchequer, under the *tenth* section of the administration of justice act, and by the transfer of suits at law thereto, under the *fourteenth* section, from the courts of session of *Chester*, and Great Sessions in *Wales*; and these rules may be classed under three heads: first, respecting *officers* of the court, and their fees, &c.: secondly, points of *practice*, relating to matters over which that court has a *peculiar* jurisdiction; and thirdly, the times and mode of proceeding in that court, on the *removal* of causes then depending, from *Chester* and *Wales*.

Power of all the judges jointly to make rules, by administration of justice act.

By the administration of justice act^b, it is enacted, that "in all cases relating to the practice of any of the courts of King's Bench, Common Pleas, or Exchequer, in matters over which the said courts have a common jurisdiction, or of or relating to the practice of the court of error therein before mentioned, it shall be lawful for the judges of the said courts jointly, or any *eight* or more of them, including the chiefs of each court, to make general rules and orders, for regulating the proceedings of all the said courts; which said rules and orders so made, shall be observed in all the said courts; and no general rule or order, respecting such matters, shall be made in any manner, except as aforesaid." In pursuance of the power given by this act, general rules were made by all the judges, in *Trinity* term 1831^c, and *Hilary* term 1832^d. Those of the former chiefly relate to the putting in and justifying of *special bail*; the shortening of *declarations* in actions of *assumpsit*, or *debt* on bills of exchange, or promissory notes, and the common counts; the delivery of *particulars* of the plaintiff's demand, under those counts; the time for delivering declarations *de bene esse*, and service of de-

Rules made in pursuance thereof.

^a R. M. 1 W. IV. Excheq. 1 Crompt. & J. 270. 1 Tyr. Rep. 154.

^b 11 Geo. IV. & 1 W. IV. c. 70, § 11. and see 1 Rep. C. L. Com. 29.

^c R. T. 1 W. IV. 2 Barn. & Ad. 788. 7 Bing. 782. 1 Crompt. & J. 469.

^d R. H. 2 W. IV. 3 Barn. & Ad. 374. 8 Bing. 288. 2 Crompt. & J. 167.

clarations in *ejectment*; the time for pleading; rules to plead several matters; and judgment of *non pros*, &c. The chief object and intent of the rules of the latter term seem to have been, as expressed in the preamble to the first of them, that the practice of the courts of King's Bench, Common Pleas, and Exchequer of Pleas, should, as far as possible, be rendered *uniform*; and they contain many very important regulations, calculated to settle and improve the practice of the courts, and to render the proceedings therein more expeditious, and less expensive to the suitors.

By the uniformity of process act^a, it is declared to be lawful for the judges of the superior courts of law at *Westminster*, and they are "thereby required, from time to time, to make all such general rules and orders, for the effectual execution of that act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters therein contained, and the performance thereof, as in their judgment shall be deemed necessary or proper." In pursuance of this statute, general rules were agreed upon by all the judges, and promulgated on the first day of *Michaelmas* term, 1832, which chiefly relate to *process*, and the mode of *declaring* thereon, and proceedings against the *sheriff*, &c.^b

Power of all the judges jointly to make rules, by uniformity of process act.

Rules made in pursuance thereof.

By the law amendment act^c, it is enacted, that "judges of the superior courts of common law at *Westminster*, or any eight or more of them, of whom the chiefs of each of the said courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings, in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient;" which rules, orders, and regulations, were directed to be laid before both houses of parliament, as therein mentioned, and were not to have effect, until six weeks after the same should have been so laid before both houses of parliament; but after that time, should be binding and obligatory on the said courts, and all other courts of common law, and be of the like force and effect, as if the provisions contained therein had been expressly enacted by parliament. And there is a

Power of all the judges jointly to make rules, by law amendment act.

^a 2 W. IV. c. 39. § 14.

Append to Tidd *Sup.* 1833. p. 247, &c.

^b R. M. 3 W. IV. 4 Barn. & Ad. 2.

^c 3 & 4 W. IV. c. 42. § 1.

9 Bing. 443. 1 Crompt. & M. 2. and see

Rules of pleading, framed in pursuance thereof.

clause in the act^a, by which the defendant is allowed to pay money into court, in certain actions, by leave of the court or a judge, by way of compensation or amends, in such manner, and under such regulations, as to the payment of costs, and the form of pleading, as the judges shall by any rules or orders, by them to be from time to time made, order and direct. In pursuance of this act, general rules were made by all the judges, relating to *Pleadings, &c.*, in *Hilary term 1834*^b; and after being laid the requisite time, before both houses of parliament, came into operation on the first day of *Easter term* following. These rules, the effect of which will be fully considered in a subsequent chapter^c, contain first, general regulations, as to the mode of pleading; and secondly, as to the pleadings in particular actions, and for the payment of money into court; with the forms of issues, judgments, and other proceedings, in actions commenced by process, under the 2 W. IV. c. 39: and having received the sanction of the legislature, they are considered as *statutory rules*, and have the form and effect of an act of parliament.

Power to make rules, for admission of written or printed documents, &c.

By other clauses of the law amendment act^d, the judges are authorized "at any time within *five* years after that act shall take effect, to "make regulations, by general rules or orders from time to time, in "term or in vacation, touching the voluntary admission, upon "an application for that purpose, at a reasonable time before the trial, "of one party to the other, of all such written or printed documents, "or copies of documents, as are intended to be offered in evidence "on the said trial, by the party requiring such admission; and touching the inspection thereof, before such admission is made, and "touching the costs which may be incurred by the proof of such "documents or copies, as to the said judges shall seem meet."*. And they are also authorized, "by any rule or order to be from time to time "made, in term or in vacation, to make such regulations for the taxation of costs, by any of the officers of the said courts indiscriminately, as to them may seem expedient, although such costs may "not have arisen in respect of business done in the court to which "such officer belongs; and to appoint some convenient place, in "which the business of taxation shall be transacted, for all the said "courts, and to alter the same, when and as it may seem to them ex-

For taxation of costs.

^a 3 & 4 W. IV. c. 42. § 21.

^b Rules of *Pleading*, H. 4 W. IV. 5 Barn. & Ad. Append. I.; 10 Bing. 463. 2 Cramp. & M. 10.

^c *Post*, Chap. XXVII.

^d 3 & 4 W. IV. c. 42. §§ 15. 36.

* There is a similar clause in the act for improving the practice and proceedings in the court of Common Pleas of the county palatine of *Lancaster*, 4 & 5 W. IV. c. 62. § 17.

"pedient." In pursuance of these latter clauses, and of the power given them by the administration of justice act^a, general rules were made by all the judges, relating to *Practice*, in *Hilary* term, 1834, which took effect on the first day of *Easter* term following^b; and chiefly relate to *demurrers*, and proceedings in *error*, and contain provisions respecting the admission of written documents: and *directions* have from time to time been given by all the judges to their officers as to the taxation of costs.

Rules made in pursuance thereof.

By the late act for improving the practice and proceedings in the court of Common Pleas at *Lancaster*^c, "it shall and may be lawful for the judges of the said court of Common Pleas at *Lancaster* for the time being, or any two of them, from time to time to make such orders, rules, and regulations, for altering and regulating the mode of pleading in that court, and for altering the mode of entering and transcribing pleadings, judgments, and other proceedings, in actions at law therein, and touching the voluntary admission of written or printed documents, &c., as to the said judges of the said court for the time being, or any two of them, shall seem meet." And "whenever, by any act of parliament, or by or under the authority of any act of parliament, or by any rule or order of any of his Majesty's superior courts at *Westminster*, or of any of the judges of the same, any rules, orders, or regulations, shall be made for the purpose of framing, regulating, or amending the proceedings, practice, or pleadings of any of the said superior courts at *Westminster*, it shall be lawful for the judges of the said court of Common Pleas at *Lancaster*, or any two of them, by rule or order to be made in that behalf, to adopt, *mutatis mutandis*, all or any of such rules, orders, or regulations, or any part or parts thereof, as to the said last mentioned judges shall seem fit."

Judges of C. P. at *Lancaster* may make rules, for altering and regulating the mode of pleading, and transcribing records, &c.

May adopt rules of superior courts at *Westminster*.

By the administration of justice Act^d, it is enacted, that "his Majesty's writ shall be directed and obeyed, and the jurisdiction of his Majesty's courts of King's Bench, Common Pleas, and Exchequer respectively, and of the several judges and barons thereof, shall extend and be exercised over and within the county of *Chester*, and the county of the city of *Chester*, and the several counties in *Wales*, in like manner, to the same extent, and to and for all intents and purposes whatsoever, as the jurisdiction of such courts respectively was then exercised, in and over the counties of *England*, not

Jurisdiction of courts at *Westminster*, extended to county palatine of *Chester*, and *Wales*.

^a 11 Geo. IV. & 1 W. IV. c. 70. § 11. 453. 2 Crompt. & M. 1.

^b Rules of *Practice*, H. 4 W. IV. 5 ^c 4 & 5 W. IV. c. 62. § 17.

Barn. & Ad. Append. xiv. 10 Bing. ^d 11 Geo. IV. & 1 W. IV. c. 70. § 13.

Jurisdiction of courts of session and Exchequer of *Chester*, and of Great sessions in *Wales*, abolished.

Suits therein to be transferred to court of Chancery, or Exchequer, at *Westminster*.

Not to affect jurisdiction of county courts of city of *Chester*.

Statutes virtually repealed by 11 Geo. IV. & 1 W. IV. c. 70. § 13, 14.

"being counties palatine; any statute theretofore passed, to the contrary notwithstanding:" And, by the same act^a, "all the power, authority, and jurisdiction, of his Majesty's court of session of the said county palatine of *Chester*, and of the judges thereof, and of his court of Exchequer of the said county palatine, and of the chamberlain and vice-chamberlain thereof, and also of his judges and courts of Great sessions, both in law and equity, in the principality of *Wales*, shall cease and determine, at the commencement of that act^b: And all suits then depending in any of the said courts, if in equity, shall be transferred, with all the proceedings thereon, to his Majesty's court of Chancery, or court of Exchequer, as the plaintiff, or, in default of his making choice before the last day of the then next *Michaelmas* term, as any defendant shall think fit; and, if in law, to the court of Exchequer; there to be dealt with and decided, according to the practice of those courts respectively, or of the court from whence the same shall be transferred, according to the discretion of the court to which the same shall be transferred; which court shall, for the purpose of such writs only, be deemed and taken to have all the power and jurisdiction, to all intents and purposes, possessed, before the passing of that act, by the court from which such sentence shall be removed: Provided always, that nothing in that act contained, shall be construed to abolish or affect the obligations and duties, or the jurisdiction or rights, then lawfully imposed upon, performed, or claimed and exercised, by the mayor and citizens of *Chester*, in the courts of the county of the city of *Chester*, or otherwise; save and except that such writs of error, or false judgment, as might then, by any charter or usage of the said corporation, be brought upon the judgments of said courts, or any of them, before any of the courts abolished by that act, should thereafter be issued, as in other cases from inferior courts, and be returnable into his Majesty's court of King's Bench."^c The courts of Session and Exchequer of *Chester*, and of Great Sessions in *Wales*, being abolished by the above act of parliament, the statute 34 & 35 Hen. VIII. c. 26. § 113^d, and other statutes referred

^a § 14. And for decisions on this section of the act, see *Williams v. Williams*, 1 Crompt. & J. 387. *Jones v. Clarke*, *id.* 447. *Williams v. Williams*, 2 Crompt. & J. 55.

^b For the reasons for^a abolishing these courts, see Lord *Lyndhurst's* speech, on

moving the second reading of the bill, in the House of Lords. *Tidd Sup.* 1830. p. 25. (a.) and see 1 Rep. C. L. Com. 40.

^c § 15.

^d *Tidd Prac.* 9 Ed. 1138.

to in the *ninth* edition of the *Practice*^a, or so much of them as relates to the proceedings in those courts, seems to be virtually repealed.

The palatine jurisdiction of the Bishop of *Durham* is separated from the bishoprick, and vested in the crown, by a late statute^b; whereby it is enacted, that “from and after the commencement of that act, the Bishop of *Durham*, for the time being, shall have and exercise episcopal and ecclesiastical jurisdiction only; and that the palatine jurisdiction, power and authority, theretofore vested in and belonging to the Bishop of *Durham*, shall be separated from the bishoprick of *Durham*, and shall be transferred to and vested in his Majesty, his heirs and successors, as a franchise and royalty, separate from the Crown; and shall be exercised and enjoyed by his Majesty, his heirs and successors, (as a separate franchise and royalty,) in as large and ample a manner, in all respects, as the same had been theretofore exercised and enjoyed by the Bishop of *Durham*; and that all forfeitures of lands or goods, for treason or otherwise, and all mines, &c., and all *jura regalia*, of what nature or kind soever, which, if this Act had not passed, would or might belong to the Bishop of *Durham* for the time being, in right of the county palatine of *Durham*, shall be vested in and belong to his Majesty, and his successors, in right of the same: Provided always, that nothing thereinbefore contained shall prejudice or affect the jurisdiction of any of the courts of the said county palatine, or any appointment theretofore made to any office in the said county palatine, or any act whatsoever theretofore done by the Bishop of *Durham*, in right of the said county palatine.”

Palatine jurisdiction of the Bishop of *Durham* separated from the bishoprick, and vested in the crown.

And it is thereby further enacted^c, that “from and after the commencement of that act, all the power, authority and jurisdiction, of the court called ‘the court of the county of *Durham*,’ and of the clerk of the court of the county of *Durham*, as judge of the same court, or otherwise, shall cease and determine, subject nevertheless, and without prejudice to any proceedings then depending in such court, as to which the authority and jurisdiction of the said court, and of the then clerk of the said court, should continue in full force and effect, notwithstanding the passing of that act: Provided always, that after the commencement of that act, the sheriff for the time being of the said county palatine shall and may have and exercise the same power of holding a county court, and the

Court of county of *Durham* to cease.

^a For an enumeration of these statutes, see Tidd Sup. 1830. p. 29. (c.)

^b 6 & 7 W. IV. c. 19.

^c § 2.

" same jurisdiction therein, as is usually had and exercised by sheriffs
" of other counties in *England*."

Serjeants at
law, how ap-
pointed.

Pre-audience of
attorney and
solicitor general
to king's pre-
mier serjeant.

Exclusive pri-
vileges of ser-
jeants abolished.

Serjeants at law (whose privileges are materially affected by a late regulation) are appointed, or called, at the pleasure of the King, by writ issuing out of Chancery: And, by the statute 6 Geo. IV. c. 95. his late Majesty was empowered, in *vacation*, to cause a writ to be issued, directed to any barrister, calling him to the degree of serjeant at law, and such persons as his Majesty might be pleased to call, were authorized to take upon themselves that office in vacation^a. But, by a warrant or mandate of his late Majesty King George the *Third*^b, the King's attorney and solicitor general were to have place and audience before the King's *premier* serjeant^c. And, by a warrant or mandate of his present Majesty, dated 23d *April*, 1834^d, it was ordered, that " the right of practising, pleading and audience, in his said Majesty's court of Common Pleas, during term times, should, upon and from the first day of *Trinity* term then next ensuing, cease to be exercised exclusively, by the serjeants at law; and that, upon and from that day, his Majesty's counsel learned in the law, and all other barristers at law, should and might, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience, in the said court of Common Pleas at *Westminster*, with the serjeants at law." By this warrant, the old rule of practice, in the Common Pleas, requiring pleas to be signed by a serjeant, was virtually repealed^e.

Officers of K. B.
and C. P.

Of Exchequer of
Pleas, before
stat. 2 & 3 W.
IV. c. 110.

The *Officers* of the courts of King's Bench and Common Pleas, with their appointments and duties, are fully treated of in the second chapter of the *Practice*^f. In the Exchequer of Pleas, before the statute 2 & 3 W. IV. c. 110, the principal officers of the court were the clerk of the Pleas, and his deputy, who was called the *Master*. The clerk of the Pleas was appointed by the Chancellor of the Exchequer for life, or *quamdiu se bene gesserit*; and the deputy, or master, by the clerk of the Pleas. The business of the master was to take minutes of what was done in court, draw up rules, make reports on matters referred

^a Tidd *Prac.* 9 Ed. 42.

^b 14th *Dec.* 1811.

^c Tidd *Prac.* 9 Ed. 42.

^d 1 Ad. & E. 122. 10 Bing. 571, 2.

6 Car. & P. 413. 8 Leg. Obs. 15. and

see 1 Rep. C. L. Com. 24.

^e *Power v. Fry*, (or *Izod*), 3 Dowl.

Rep. 140. 1 Bing. N.R. 304. 1 Scott, 119. S. C.

^f Tidd *Prac.* 9 Ed. 43, &c.

to him, tax bills of costs, allow bails, and sign process and judgments^a, &c. The clerk of the Pleas was also, by virtue of his office, clerk of the *Errors* in the Exchequer Chamber; and his duties in that character were, to allow writs of error, certify transcripts, attend the court of Exchequer Chamber when sitting, and draw up rules thereon^a.

By the above statute, for the better regulation of the duties to be performed by the officers on the plea or common law side of the court of Exchequer, after reciting that an Act had been passed in the first year of the reign of his present Majesty, intituled "an Act for the more effectual administration of justice in *England* and *Wales*;"^b and, by the said Act, certain changes were made on the plea or common law side of the court of Exchequer; and that *William Stewart Rose* Esquire then was clerk of the Pleas in the said court, and was lawfully entitled to execute the said office by himself, or his sufficient deputy, during the term of his natural life; and *Thomas Dax* Esquire, commonly called the *Master*, then was deputy clerk of the Pleas, and *Stephen Richards*, *Kenrick Collett*, *Edmund Walker*, and *George Chilton* Esquires, were the four sworn clerks in the said court; and the said *Thomas Dax*, *Stephen Richards*, *Kenrick Collett*, *Edmund Walker*, and *George Chilton*, were the *five* principal acting officers of the said court; and that the business, in the offices on the plea or common law side of the said court, had greatly increased, and the same, since the passing of the said Act, had been conducted and performed by the said deputy clerk of the pleas, and the said four sworn clerks, but without any regulation as to the respective duties to be performed by each; and many of the duties of the master had from necessity been performed by the sworn clerks, but without any obligation upon them to perform such duties; and that it was expedient to apportion such business among the said officers, and to fix and determine the duties to be performed by them respectively; it is enacted, that "from and after the commencement of that act^c, there shall continue to be *five* principal officers on the "plea side of the said court, exclusive of the said *William Stewart Rose* Esquire, the said clerk of the pleas, (whose office, when a "vacancy shall occur by his demise or otherwise, is not again to be "filled up^d), and no more; and that the said *Thomas Dax*, *Stephen Rich-*

By that statute.

Principal officers, on the plea side of the court, and their duties.

^a Tidd *Proc.* 9 Ed. 58. And for an account of the present duties of the officers of the court of Exchequer of Pleas, and of the business done in that court, see *Dax Excheq.* 2 Ed. 4, &c. 10, &c.

^b 11 Geo. IV. & 1 W. IV. c. 70. § 10-14.

^c 2 & 3 W. IV. c. 110.

^d § 8.

“ *ards, Kenrick Collett, Edmund Walker, and George Chilton Esquires,*
 “ who had so conducted the business on the plea side of the said
 “ court, and their successors, shall, from and after the passing of
 “ that act, perform the same as follows: that is to say, the said
 “ *Thomas Dax, Kenrick Collett, and Edmund Walker,* shall perform
 “ the duties of *master and prothonotary*; the said *Stephen Richards,*
 “ the duties of *clerk of the rules,* and the said *George Chilton* the
 “ duties of *filazer* of the said court; and the said officers shall be
 “ styled and designated accordingly: and if any doubt or difference
 “ shall at any time arise respecting the duties to be performed by the
 “ said respective officers, the same shall be settled and determined
 “ by the Lord Chief Baron, and the other barons of the said court,
 “ for the time being.”^a And it is thereby further enacted, that
 “ the office of clerk of the *Errors*, then filled and executed by
 “ the said *Thomas Dax,* shall continue to be filled and executed
 “ by him, as long as he shall be a master or prothonotary of the said
 “ court, and no longer; and the same shall always hereafter be filled
 “ by the person who shall be the *senior* master or prothonotary of
 “ the court for the time being^b: And that the said officers, and
 “ their assistants and clerks, shall give their attendance in court or
 “ elsewhere, and shall conduct the business in their several depart-
 “ ments, at such hours, and in every respect in such manner, as the
 “ said Lord Chief Baron, and other barons of the said court, shall
 “ from time to time order and direct.”^c

In the King's Bench and Common Pleas, the offices of the courts
 are kept open, for the dispatch of business, in term time, and for *ten*
 days after every issuable term, and one week after every other term,
 from *eleven* in the morning, till *two* in the afternoon; and, in the
 evening, from *five* till *seven*; and from *eleven* in the morning, till *three*
 in the afternoon, at all other times^d. In the Exchequer of Pleas
 there was a rule, made in pursuance of the administration of
 justice Act^e, that “ the office of pleas shall be kept open for
 “ business every day, (*Sundays, Christmas day, Good Friday,*
 “ *Easter Monday, Ascension day, and Midsummer day,* and days
 “ appointed for public feasts, thanksgiving, or fasts, excepted,)”
 “ from the hour of *eleven* in the morning, till *three* in the afternoon,
 “ and from *five* o'clock in the afternoon, till *nine* o'clock at night,
 “ during term, and for *sixteen* days after an issuable term, and for

Clerk of the
errors.

Attendance, and
hours of busi-
ness.

Office hours, in
K. B. & C. P.

At Exchequer
office.

^a 2 & 3 W. IV. c. 110. § 1.

^b § 4.

^c § 5.

^d 3 Chit. Gen. Pr. 106, 7. and see 12
Leg. Obs. 177.

^e 11 Geo. IV. & 1 W. IV. c. 70. § 10.

"ten days after a non-issuable term; and at other times, till seven o'clock in the evening."^a And, by a subsequent rule of that court^b, "the Exchequer office of pleas is to be kept open as follows, that is to say, during term, and one week after every term, from eleven o'clock in the morning, until three o'clock in the afternoon, and from six to nine o'clock in the evening; and at other times, from eleven o'clock in the morning, until four o'clock in the afternoon, the usual holidays excepted, when the said office is to be closed."

The fees of the officers of the superior courts are fully treated of in the first Supplement to the *Practice*^c, under the following heads; first, in what cases they are, or are not allowed; secondly, the *quantum* or amount of fees, and by what means they are settled and ascertained; thirdly, the provisions respecting them, by several recent statutes; fourthly, the remedies for the recovery of them, by officers of the court; and fifthly, the remedies against officers, in cases of extortion, &c. In treating of these fees it has been shewn^d, that by an Act passed in the 11th year of the reign of King George the Fourth, and 1st year of the reign of his present Majesty, intituled, "*An Act for regulating the receipt and future appropriation of fees and emoluments, receivable by officers of the superior courts of common law*,"^e persons holding certain offices and employments are required to render to the commissioners, to be appointed by virtue of the said act, an account of the lawful fees and emoluments which have become due, in respect of such offices and employments, during the periods therein specified; and such commissioners are thereby authorized to inquire into and examine, as well the legality as the amount of the fees and emoluments contained in such accounts, and are directed to ascertain the gross and net annual value, according to an average of ten years, of the lawful fees and emoluments of such offices and employments as aforesaid: But it being found difficult, in many cases, to find any certain rule by which the legality of such fees and emoluments could be strictly ascertained, and it being expedient that the compensation directed by the said Acts should be made upon equitable principles, it is enacted and declared by the statute 1 & 2 W. IV. c. 35^f, that "all fees and emoluments received and enjoyed in respect of the said offices or employments, which the said commissioners shall deem to be reasonable, and which shall have been

Fees of officers
of superior
courts.

What shall be
deemed legal
fees, by stat. 1
& 2 W. IV. c.
35.

^a R. M. 1 W. IV. reg. I. § 4. 1 Crompt. & J. 272. 1 Tyr. Rep. 156.

^b R. M. 3 W. IV. 2 Crompt. & J. 1. 2 Tyr. Rep. 168.

^c Tidd *Supp.* 1830. p. 32, &c.

^d *Id.* 40, &c.

^e Stat. 11 Geo. IV. & 1 W. IV. c. 58. and see the preamble to stat. 1 & 2 W. IV. c. 35.

^f § 1.

"received for *fifty* years before the 24th day of *May* 1831, or which shall have been uniformly received, in respect of any matter or business which shall have first arisen within the said period of *fifty* years, by authority of parliament, or other legal authority, shall be deemed and taken to be legal fees and emoluments, within the true intent and meaning of the said act."

How settled, if commissioners are in doubt as to their legality.

And it is thereby further enacted, that "if such commissioners shall entertain any doubt as to the propriety or reasonableness of any such fees, or any matter connected therewith, it shall be lawful for them to consult thereon the court or judge by whose officer the same may have been received, or any one or more of the judges of such court; and such court and judges shall, and are thereby required to give their or his advice and opinion, as early as the same can be reasonably done; and that the advice so given, and the question to which it is in answer, shall be in writing."^a And that "the persons holding the offices or situations named in the schedule to that act annexed^b, shall be deemed and taken to be within the true intent and meaning of the said Act, and within the authority and jurisdiction of the said commissioners, who shall inquire into and report upon the value of the said offices or situations."^c

What person within meaning of the statute.

Compensation for.

By the administration of justice Act^d, persons holding *freehold* offices were alone empowered to receive compensation from commissioners to be appointed by virtue of that act; but it being considered that the holders of such offices for years, or during pleasure, were in justice entitled thereto, it was enacted, by the statute 1 & 2 W. IV. c. 35^e, that "all persons who, before the *first* day of *January* 1828, held offices or situations in any of the courts of great session in the county of *Chester*, or principality of *Wales*, by virtue of any appointment theretofore lawfully made, for term of years, or during pleasure, shall be deemed and taken to be within the true intent and meaning of the said act as above mentioned, and within the

^a § 2.

^b These persons are, the master or secondary of the court of King's Bench at *Westminster*; signer of the writs in the same court; chaplain of the King's Bench prison; chief usher of the said court; under ushers and criers of the same court; keeper of *Westminster* hall; warden of the *Fleet* prison; officers of the revenue side of the courts of Exchequer at *West-*

minster; officers acting under commissioners of assize at *Nisi Prius*, *oyer* and *terminer*, and general gaol delivery, in *England*; who held such office on the *twenty-fourth* day of *May* in the year of our Lord 1830.

^c Stat. 1 & 2 W. IV. c. 35. § 3.

^d 11 Geo. IV. & 1 W. IV. c. 70. § 25. *Tidd Sup.* 1830. p. 49.

^e § 4.

“jurisdiction and authority of the commissioners appointed by virtue of the same act.”

In the Common Pleas, by a general rule^a, reciting that, by the ancient course of this court, the fee paid to the *prothonotaries*, for the entry of every declaration in a cause, has hitherto been of right payable at the time of filing thereof; and that it was expedient that for the future, the practice of the court should be made conformable to that of the respective courts of King's Bench and Exchequer, so far as regards the time of such payment; it is ordered, that “from and after the essoign day of the then next *Trinity* term, the fee due to the said *prothonotaries*, for such entry as aforesaid, may be paid at any time previously to entering the issue, or passing the record in each cause; or in case there shall be no record, at any time previously to signing interlocutory or final judgment: And further, that in all cases where there shall be no judgment, the said fee shall be payable at the time of taxing costs, where the proceedings in any cause are stayed, or such cause terminated by any rule of this court, or order of a judge.” And, by a subsequent rule of the same court^b, “every person admitted an attorney of this court, not having already entered such his admission, and also every attorney hereafter to be admitted, shall forthwith enter his admission, and shall cause his annual certificate to be, on or before the first day of *Easter* term in every year, entered with the clerk of the warrants; which entries shall in all cases, where the annual certificate has been already entered in one of the courts, be made without fee or reward; and shall, at the same time, pay and discharge all his arrears of termage fees.”

Fee to prothonotaries, for entry of declaration, in C. P. when payable.

Termage fees payable by attornies to clerk of the warrants.

By the administration of justice Act^c, “it shall be lawful for the “barons of the court of Exchequer, and they are thereby required, “to distinguish by their rules and orders, the *fees* which shall continue to be taken by the sworn and side clerks of the court, for the “duties performed as officers of the court, similar to the duties of “the officers of the other superior courts, from such fees and charges “as shall be allowed to be taken by the attornies admitted to practice as therein mentioned; so that the amount of such fees and “charges, upon the whole, do not exceed the amount and rate of “such fees and charges as were then allowed upon taxation of “costs.” In pursuance of this act, rules were made by the ba-

Rules respecting officers of the court of Exchequer, and their fees, &c.

^a R. E. 1 W. IV. 7 Bing. 555, 6. 5 289. 1 Bing. N. R. 411. 9 Leg. Obs. Moore & P. 483. 1 Dowl. Rep. 226. 159.

and see Tidd *Prac.* 9 Ed. 47.

^c 11 Geo. IV. & 1 W. IV. c. 70. § 10.

^b R. M. 5 W. IV. C. P. 1 Scott,

rons of the Exchequer, in *Michaelmas* term 1830^a, respecting the officers of the court of Exchequer of Pleas, and their fees, &c.; by which it was ordered, that "the several fees thereunder mentioned^b, should and might continue to be taken by the sworn and side clerks of that court, the same being for duties to be performed by them as officers of the court, similar to the duties of the other superior courts": And it was further ordered, that, "in the taxation and allowance of costs, such fees should be distinguished from, and form no part of the fees and charges which should be allowed to the attornies who had been, or should be admitted to practise, under and by virtue of the said act, but the same should be allowed as disbursements^c: That the several duties for which fees were appointed in the said schedule, should be performed by the sworn and side clerks of the said office, or their sufficient deputies or deputy, on the request of the persons admitted to practise as attornies in that court, within the hours and times thereafter appointed, whereupon such fees as aforesaid should become payable^c: And that the several duties theretofore performed by the clerk of the pleas, or his deputy, at the instance of the sworn or side clerks of the office of pleas, should thereafter, at the instance of, and for the attornies admitted as aforesaid, be in like manner performed by the said clerk of the pleas, or his deputy, on payment of his lawful fees for the same."^c It is observable, however, that the several duties heretofore performed by the sworn or side clerks in the Exchequer of Pleas, have, ever since the statute 2 & 3 W. IV. c. 110^d, been performed by the officers therein mentioned; and that this statute does not interfere with the fees formerly payable to those officers: the same fees are still payable in the course of the proceedings; but some fees which were formerly payable to one officer, are transferred to another^e. It has been determined, that a clerk in court, in the King's remembrancer's office, is entitled to charge a term fee in a revenue prosecution, at the suit of the Attorney General, where only a *subpoena ad respondendum* issues, without any information, or other proceeding being had^f.

Judges of superior courts at Westminster may regulate fees to be taken

For regulating fees in the Common Pleas at *Lancaster*, it is enacted by the statute 4 & 5 W. IV. c. 62. § 25, that "the judges of the superior courts of common law at *Westminster*, or any eight or more of them, of whom the chiefs of each of the said courts shall be

^a R. M. 1 W. IV. reg. 1. 1 Crompt. & 156.
J. 270. 1 Tyr. Rep. 154, 5.

^d *Ante*, 34, 5.

^b For the schedule of these fees, see *id.*

^e Dax Ex. Pr. 2 Ed. 3.

ib. Tidd Sup. 1832. p. 97.

^f Attorney-General v. Munday, 2

^c 1 Crompt. & J. 272. 1 Tyr. Rep. Crompt. & J. 347. 2 Tyr. Rep. 305. S. C.

" *three*, may, by any rule or order to be from time to time made after in Common
 " that act shall take effect, make such regulations, as to the fees to Pleas at Lan-
 " be charged by all and every or any of the officers of the said court caster.
 " of Common Pleas at *Lancaster*, and the attornies thereof, as to
 " them may seem expedient, and to alter the same, when and as it may
 " seem fit and proper, so as such fees shall not exceed the fees now
 " received; and all such regulations shall be binding and obligatory
 " on the said court of Common Pleas at *Lancaster*, and all the officers
 " and attornies of the said court."

It may not be improper, in this place, to take a general view of the Alterations of
 alterations which have been made, by several recent statutes and terms and re-
 rules of court, in the *terms*, and returns of writs, &c. turns.

The *Terms* are those times or seasons of the year, which are set Terms, what,
 apart for the dispatch of business, in the superior courts of common and when they
 law; and are called, from some festival or saint's day which formerly began and ended.
 preceded their commencement, the terms of St. *Hilary*, of *Easter*,
 of the Holy *Trinity*, and of St. *Michael*. *Hilary* term formerly
 began on the octave of St. Hilary, or the eighth day inclusive after
 the feast day of that saint, which falling on the 13th January, the
 octave therefore, or first day of Hilary term, was the 20th January;
 and it ended on the 12th February following, unless it happened on
 a Sunday, and then on the 13th February^a: *Easter* term began in
 fifteen days of Easter, being the *Sunday* fortnight after that festival,
 and ended on *Monday* before Whit-Sunday: *Trinity* term, which
 was abridged by the statute 32 Hen. VIII. c. 21, began on the
 morrow of the Holy Trinity, being the Monday next after Trinity
 Sunday, and ended on the *Wednesday* three weeks after, unless it
 happened on the 24th June, and then on the day following: *Michael-*
mas term, which was abridged by the statute 16 Car. I. c. 6, and still
 further by the 24 Geo. II. c. 48, began (five weeks after *Michaelmas*
 day) on the morrow of all Souls, being the 3d of November, and
 ended on the 28th November following, if not a *Sunday*, otherwise
 on the 29th^b. Of these terms it may be observed, that *Michaelmas* Fixed and
 and *Hilary* were *fixed* terms, and invariably began on the same day moveable.
 of the year; but *Easter* and *Trinity* terms were *moveable*, their com-

^a In *Hilary* term, the first day of *full* ended, and ended *fourteen* weeks after *Mi-*
 term was the *twenty-third* of January, if *ichaelmas* term began. Man. Excheq. Ap-
 not *Sunday*; and if *Sunday*, the next day pend. 2.
 after; and this term always began that day
^b Tidd *Prac.* 9 Ed. 106, 6, 7.
 eight weeks, on which *Michaelmas* term

Essoign or general return days.

Duration of terms, and essoign or general return days, as fixed and regulated by stat. 11 Geo. IV. & 1 W. IV. c. 70.

mencement being regulated by the feast of *Easter*. In each of these terms, there were stated days called *essoign* or *general return days*^a, on which all *original writs*, and process thereon, must have been made returnable; in the King's Bench, *ubicunque*, &c., or where-soever the king should then be in *England*^b, or, in the Common Pleas, before the king's justices at *Westminster*.

The duration of terms, and the essoign or general return days of original writs, &c., are now fixed and regulated by the statutes 11 Geo. IV. & 1 W. IV. c. 70^c, and 1 W. IV. c. 3. By the former of these statutes it is enacted, that "in the year of our Lord 1831, and "afterwards, *Hilary* term shall begin on the *eleventh*, and end on the "thirty-first day of *January*; *Easter* term shall begin on the *fifteenth* "day of *April*, and end on the *eighth* day of *May*; *Trinity* term "shall begin on the *twenty-second* day of *May*, and end on the "twelfth day of *June*; and *Michaelmas* term shall begin on the "second, and end on the *twenty-fifth* day of *November*: and that the "essoign and general return days of each term shall, until further "provision be made by parliament, be as follows; that is to say, the "first essoign or general return day for every term shall be the *fourth* "day before the day of the commencement of the term, both days "being included in the computation; the *second* essoign day shall be "the *fifth* day of the term; the *third* shall be the *fifteenth* day of the "term; and the *fourth* and last shall be the *nineteenth* day of the "term, the first day of the term being already included in the com- "putation; with the same relation to the commencement of each term "as they now bear, and shall be distinguished by the day of the "term on which they respectively fall, the *Monday* being in all cases "substituted for the *Sunday*, when it shall happen that the day would "fall on a *Sunday*, except always that in *Easter* term there shall be "but *four* returns instead of *five*, the last being omitted: Provided, "that if the whole or any number of the days intervening between "the *Thursday* before, and the *Wednesday* next after *Easter* day, "shall fall within *Easter* term, there shall be no sittings in *banc* on "any of such intervening days, but the term shall in such case be "prolonged and continue for such number of days of business, as "shall be equal to the number of the intervening days before men- "tioned, exclusive of *Easter* day; and the commencement of the en-

^a For the essoign or general return days, before stat. 11 Geo. IV. & 1 W. IV. c. 70. § 6, see Tidd *Prac.* 9 Ed. 106. 1 Rep. C. L. Com. 32.

^b Trye, 2. and see Marsh v. Blachford, 1 Chit. R. 323.

^c § 6.

"suing *Trinity* term shall in such case be postponed, and its continuance prolonged, for an equal number of days of business."

By the statute 1 W. IV. c. 3^a, so much of the former act as relates to the appointment of *essoign* or *general* return days, is repealed; and it is thereby enacted^b, that "all writs usually returnable before any of his majesty's courts of King's Bench, Common Pleas, or Exchequer respectively, on *general* return days, may be made returnable on the third day exclusive before the commencement of each term, or on any day, not being *Sunday*, between that day and the *third* day exclusive before the last day of the term; and the day for appearance shall, as heretofore, be the third day after such return, exclusive of the day of the return; or in case such *third* day shall fall on a *Sunday*, then on the *fourth* day after such return, exclusive of such day of return." The *three* days, however, previous to the *first* day in full term, cannot it seems be considered as part of the term^c. And, in order to remove all doubts as to the duration of the terms, it is declared and enacted^d, that "in case the day of the month on which any term, according to the former act, is to *end*, shall be on a *Sunday*, then the *Monday* next after such day shall be deemed and taken to be the last day of the term; and that in case any of the days between the *Thursday* before, and the *Wednesday* next after *Easter* shall fall within *Easter* term, then such days shall be deemed and taken to be a part of such term, although there shall be no sittings in *banc* on any of such intervening days." On this statute it was holden, that a writ may be made returnable on any of the days between the *Thursday* before, and the *Wednesday* after *Easter* day, when those days fall in *Easter* term^e: But, by a general rule of all the courts^f, "the days between the *Thursday* next before, and the *Wednesday* next after *Easter* day, shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trial, and notices of inquiry, in any of the courts of law at *Westminster*." On this rule it has been decided, that the days between *Thursday* next before, and *Wednesday* next after *Easter* day, are not to be reckoned in notices of

By stat. 1 W.
IV. c. 3.

^a § 1.

^b § 2.

^c Price v. Hughes, 1 Dowl. Rep. 448.

^d Leg. Obs. 409. S. C. per Patteson, J.

^e § 3.

^f Lilly v. Gompertz, 1 Dowl. Rep. 376.

^g Leg. Obs. 26, S. C. per Taunton, J.

after conferring with the other judges. Hall v. Welchman, 2 Crompt. & J. 472. 1 Dowl. Rep. 566. S. C.

^h R. E. 2 W. IV. 3 Barn. & Ad. 394.

1 Moore & S. 681. 8 Bing. 466. 2 Tyr.

Rep. 502. 2 Crompt. & J. 491, 2. 1

Dowl. Rep. 423.

justification of bail^a. But notice of trial before the sheriff may be given for *Easter Tuesday*^b.

Beginning and ending of terms, on the above statutes.

Since the above statutes, *Hilary* term begins on the *eleventh*, and ends on the *thirty-first* day of *January*, unless that day fall on a *Sunday*, and then on the *Monday* following, being the *first* day of *February*: *Easter* term begins on the *fifteenth* day of *April*, and ends on the *eighth* day of *May*, unless that day fall on a *Sunday*, and then on the *Monday* following, being the *ninth* day of *May*; or unless the whole or some of the days intervening between the *Thursday* before, and the *Wednesday* next after *Easter* day, fall within *Easter* term, in which latter case the term is prolonged, and continues for such number of days of business, as are equal to the number of intervening days before mentioned, exclusive of *Easter day*^c; and if the last of the days to which it is so prolonged fall on a *Sunday*, then the term ends on the *Monday* following: *Trinity* term begins on the *twenty-second* day of *May*, and ends on the *twelfth* day of *June*, unless that day fall on a *Sunday*, and then on the *Monday* following, being the *thirteenth* day of *June*; or unless *Easter* term be prolonged by such intervening days as before mentioned, in which latter case the commencement of *Trinity* term is postponed, and its continuance prolonged, for an equal number of days of business^d; and if the last day to which it is so prolonged fall on a *Sunday*, then the term ends on the *Monday* following: *Michaelmas* term begins on the *second*, and ends on the *twenty-fifth* day of *November*, unless the latter day fall on a *Sunday*, and then on the *Monday* following, being the *twenty-sixth* day of *November*. It is not said, in either of the above acts, on what day the term shall *begin*, in case 'the day appointed for its commencement happen on a *Sunday*'; but it seems that in such case, the day so appointed must still in point of law, for the purpose of computation, be considered as the first day of the term^e; although, as the courts do not sit, an appearance cannot be entered, nor any judicial act done, or supposed to be done, till the *Monday*^f: And, as *Sunday* is

Beginning of term, when day appointed for its commencement happens on *Sunday*.

^a *Cumming v. Pullen*, 1 Scott, 538.

^b *Charnock v. Smith*, 3 Dowl. Rep. 607. 1 Har. & W. 217. 10 Leg. Obs. 111. 471. S. C.

^c As to the prolongation of *Easter* term in 1835, see 9 Leg. Obs. 482, 3.

^d As to the beginning and ending of *Trinity* term, in 1835, see 9 Leg. Obs. 482, 3.

^e *Doe v. Roe*, 1 Dowl. Rep. 63. 2 Leg. Obs. 77. S. C. *Doe d. Brent v. Roe*, 1 Crompt. & J. 483. 1 Tyr. Rep. 499. S. C. *Doe d. Shepherd v. Roe*, 1 Price, N. R. 32., and see 1 Tyr. Rep. 500.

^f Reg. Brev. 19. *Bedoe v. Alpe*, W. Jon. 156. *Davies v. Salter*, 2 Salk. 626, 7. 6 Mod. 250. S. C. *Swan v. Broome*,

not considered at common law as a *dies juridicus*^a, writs cannot, when the first day of term falls on a *Sunday*, be made returnable till the *Monday* following^b.

The *first* essoign or general return day for *Hilary* term, is the *eighth* day of *January*; for *Easter* term, the *twelfth* day of *April*; for *Trinity* term, the *nineteenth* day of *May*, unless the commencement of that term be postponed, in consequence of such intervening days as before mentioned, and then the first essoign or general return day is the *third* day exclusive before the day to which its commencement is postponed; and for *Michaelmas* term, it is the *thirtieth* day of *October*. When the third day exclusive before the commencement of the term falls on a *Sunday*, it seems that writs may be made returnable thereon: And indeed it is observable, that before the late acts, the essoign or general return days of *Easter* term, except the last, were always, and those of *Michaelmas* and *Hilary* terms occasionally on *Sunday*. The essoign or general return days of each term, after the *first*, may be any day, not being *Sunday*, between the third day exclusive before the commencement, and the third day exclusive before the last day of the term^c; but the latter day, being it seems excluded by the language of the act, is not a good general return day: The *last* essoign or general return day therefore, of each term, is the *fourth* day exclusive before the last day of the term, unless that day happen on a *Sunday*, and then, *Sunday* being also excluded, the last essoign or general return day is the *Saturday* preceding^d. The day for appearance, on writs usually returnable on general return days, is declared, by the statute 1 W. IV. c. 3. § 2, to be, as heretofore, the *third* day exclusive after the return day; or, in case such *third* day fall on a *Sunday*, then the *fourth* day after such return, exclusive of the day of return^e.

By the statute 5 & 6 Edw. VI. c. 3. certain days therein mentioned, consisting principally of *Saints'* days, several of which happened in term time, were required to be kept holidays^f: But, by the law

Essoign or
general return
days.

Appearance day.

Holidays men-
tioned in stat 5
& 6 Edw. VI.
c. 3. abolished.

³ Bur. 1596. 1 Blac. Rep. 496. 526. S. C.

^a Co. Lit. 135. Com. Dig. tit. *Temps*, (B. 3).

^b For a general Table of the Terms and Returns, see Append. to Tidd *Sup.* 1832, p. 98.

^c Stat. 1 W. IV. c. 3. § 2.

^d Append. to Tidd *Sup.* 1832, p. 98. and see Twynning demandant, Lowndes

tenant, 10 Bing. 65. 68. 3 Moore & S. 443. S. C.

^e Append. to Tidd *Sup.* 1832, p. 98.

^f For an account of the different holidays, and when they were commanded or allowed to be kept, in term time or vacation, with the remedies for not opening the offices on other days, or refusing to do business in office hours, without the payment of extra fees, see Tidd *Prac.* 9 Ed. 55, &c.

Subsequent regulation.

amendment Act^a, reciting that the observance of holidays, in the superior courts of common law, during term time, and in the offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient, and tends to delay in the administration of justice; it is enacted, that "none of the several days mentioned in "the said statute, shall be observed or kept in the said courts, or in "the several offices belonging thereto, except *Sundays*, the day of "the nativity of our Lord, and the *three* following days, and *Monday* "and *Tuesday* in *Easter* week." By a subsequent rule, however, of all the courts^b, it is ordered, that, "thenceforth, in addition to the said days, the following and none other shall be observed or kept as holidays, in the several offices belonging to the said courts, viz., *Good Friday*, and *Easter* Eve, and such of the *five* days following as may not fall in the time of term, but not otherwise; the birthday of our Lord the King, (*21st August*,) the birth day of our Lady the Queen, (*13th August*,) the day of the accession of our Lord the King, (*26th June*,) Whit Monday, and Whit Tuesday."

^a 3 & 4 W. IV. c. 42. § 43.

3 Scott, 5. 1 Meeson & W. 5, 6. 1 Tyr.

^b R. H. 6 W. IV. 6 Nev. & M. 5.

& G. 237. 4 Dowl. Rep. 555, 6. 11 Leg.

1 Har. & W. 639. 2 Bing. N. R. 615.

Obs. 226.

CHAP. III.

Of the EXAMINATION, ADMISSION, and RE-ADMISSION of ATTORNIES.

IN this Chapter it is proposed to consider, 1. the examination of persons desirous of being admitted attornies; 2. the admission of persons who have served their clerkships in *Wales*, or the counties palatine; 3. the admission of attornies of the King's Bench and Common Pleas to practise in the Exchequer; and, 4. the re-admission of attornies. The *privileges* of attornies, and in what manner they are affected by the uniformity of process Act, with the proceedings in actions by and against them, and other matters relating to the recovery and taxation of their costs, will be treated of in a subsequent Chapter^a.

By the statute 4 *Hen.* IV. c. 18. it was enacted, that "all the attornies shall be examined by the justices, and, by their discretions, their names put on the roll; and they that be good and vertuous, and of good fame, shall be received, and sworn well and truly to serve in their offices." By the statute 3 *Jac.* 1. c. 7. §. 2. it was enacted, that "none shall from thenceforth be admitted attornies, in any of the King's courts of record, but such as have been brought up in the same courts, or otherwise well practised in soliciting of causes, and have been found, by their dealings, to be skilful, and of honest disposition; and that none be suffered to solicit any cause or causes in any of the courts aforesaid, but only such as are known to be men of sufficient and honest disposition."^b And by a rule made in *Michaelmas* term, 1654^c, in the courts of King's Bench and Common Pleas, it was ordered, that "the courts should once in every year, in *Michaelmas* term, nominate *twelve* or more able and credible practisers, to continue for the ensuing year, to examine such persons as should desire to be admitted attornies, and appoint convenient times and places for the examination; and the persons desiring to be admitted, were first to attend, with their proofs of service, then to repair to the persons appointed to examine, and being approved, to be presented to the court and sworn." By the statute 2 *Geo.* II. c. 23. §. 2, it was enacted,

Examination of attornies, by stat. 4 *Hen.* IV. c. 18.

By stat. 3 *Jac.* I. c. 7. § 2.

By rule of M. 1654.

By stat. 2 *Geo.* II. c. 23. § 2.

^a Chap. XIV.

^b Tidd *Prac.* 9 Ed. 60.

^c § 4. K. B. & C. P. Tidd *Prac.* 9 Ed. 60.

that "the judges or any one or more of them, should, and they were thereby authorized and required, before they should admit such person to take the oath, to examine and inquire, by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney; and if such judge or judges respectively, should be thereby satisfied, that such person was duly qualified to be admitted to act as an attorney, then, and not otherwise, the said judge or judges of the said courts respectively, should, and they were thereby authorized, to administer to such person the oath thereafter directed to be taken by attorneys; and after such oath taken, to cause him to be admitted an attorney of such court respectively."^a

By R. H. 6 W.
IV.

Examiners to
be appointed
annually.

None to be
admitted
without pro-
ducing examin-
ers' certificate of
his fitness and
capacity.

Examinations
how conducted.

Remedy in
case of refusal
to grant cer-
tificate.

In order to carry the last mentioned statute more fully into effect, it being deemed expedient annually to appoint examiners, subject to the control of the judges in manner thereafter mentioned, it was ordered, by a late rule of all the courts^b, that "the several masters and prothonotaries, for the time being, of the courts of King's Bench, Common Pleas, or Exchequer respectively, together with *twelve* attorneys or solicitors, to be appointed by a rule of court in *Easter Term* in every year, be examiners for one year; any *five* of whom, one whereof to be one of the said masters or prothonotaries, shall be competent to conduct the examination^c; and that from and after the last day of the then next *Easter Term*, subject to such appeal as thereafter mentioned, no person shall be admitted to be sworn an attorney of any of the courts, except on production of a certificate, signed by the major part of such examiners, actually present at and conducting his examination; testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a judge:" And it is thereby further ordered, that "the examiners so to be appointed, shall conduct the said examinations, under regulations to be first submitted to and approved by the judges^d: and that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission, by petition in writing to the judges, to be delivered to the clerk of the Lord Chief Justice of the court of

^a Tidd *Prac.* 9 Ed. 71.

^b R. H. 6 W. IV. § 1. 6 Nev. & M. 2, &c. 1 Har. & W. 638, 9. 2 Bing. N. R. 612, &c. 3 Scott, 2, 3. 1 Meeson & W. 1, 2, 3. 1 Tyr. & G. 233, 4, 5. 4 Dowl. Rep. 551, 2. 11 Leg. Obs. 255, 6.

^c For the first appointment of examin-

ers under this rule, see R. H. 6 W. IV. 2 Bing. N. R. 800. 11 Leg. Obs. 478.

^d R. H. 6 W. IV. § 2. 6 Nev. & M. 3. 1 Har. & W. 638. 2 Bing. N. R. 612. 3 Scott, 3. 1 Meeson & W. 3. 1 Tyr. & G. 234, 5. 4 Dowl. Rep. 552, 3. 11 Leg. Obs. 256.

King's Bench, upon which no fee or gratuity shall be received ; which application shall be heard in *Serjeant's Inn* Hall, by not less than *three* of the judges." ^a And, after reciting that the hall or building of the Incorporated Law Society of the United Kingdom, in *Chancery Lane*, would be a fit and convenient place for holding the said examination, and that the said Society had consented to allow the same to be used for that purpose ; it is thereby further ordered, that " until further order, such examinations be there held, on such days, being within the last *ten* days of every term, as the said examiners, or any *five* of them, shall appoint : And that any person not previously admitted an attorney of any of the three courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners, of his intention to apply for examination, by leaving the same with the secretary of the said Society, at their said hall ; which notice shall also state his place or places of residence or service, for the last preceding twelve months ; and in case of application to be admitted on a refusal of the certificate, shall give *ten* days' notice, to be served in like manner, of the day appointed for hearing the same." ^a

Time and place
of examination.

Notice to
examiners.

In pursuance of the foregoing rule, the following regulations for conducting the examination of persons applying to be admitted as attorneys of the court of King's Bench, Common Pleas, or Exchequer, were submitted to and approved by the judges of the said courts, in *Easter Term* 1836^b, viz. 1. That every person applying to be admitted an attorney of any of the said courts, pursuant to the said rules, shall within the first *seven* days of the term in which he is desirous of being admitted, leave or cause to be left with the secretary of the said Incorporated Law Society, his articles of clerkship, duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions thereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship. 2. That, in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable. 3. That every person applying for ad-

Regulations
for conducting
examination.

^a R. H. 6 W. IV. 6 Nev. & M. 3. 1 4 Dowl. Rep. 553. 11 Leg. Obs. 256.
Har. & W. 688. 2 Bing. N. R. 613. 1 ^b 2 Bing. N. R. 801, 2, 3. 1 Meeson
Meeson & W. 3, 4. 1 Tyr. & G. 235. & W. 292, &c. 12 Leg. Obs. 52, 3.

mission shall also, if required, sign and leave, or cause to be left, with the secretary of the said society, answers in writing to such other written or printed questions as shall be proposed by the said examiners, touching his said service and conduct; and shall also, if required, attend the said examiners personally, for the purpose of giving further explanations touching the same; and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship as aforesaid, to answer, either personally or in writing, any questions touching such service or conduct, or shall make proof, to the satisfaction of the said examiners, of his inability to procure the same.

4. That every person so applying, shall also attend the said examiners, at the hall of the said Society, at such time or times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint; and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as an attorney. 5. That upon compliance with the aforesaid regulations, and if the major part of the said examiners, actually present at and conducting the said examination, (one of them being one of the said masters or prothonotaries,) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same, under their hands, in the following form, *viz.* "In pursuance of the rules made in *Hilary and Easter Terms 1836*, of the courts of King's Bench, Common Pleas, and Exchequer, we, being the major part of the examiners actually present and conducting the examination of *A. B.* of, &c. do hereby certify, that we have examined the said *A. B.* as required by the said rules; and we do testify, that the said *A. B.* is fit and capable to act as an attorney of the said courts." These regulations also contain the questions, as to due service, to be answered by the clerk and attorney respectively; with the *certificate*, to be signed by the latter, that the former hath duly and faithfully served, under his articles of clerkship, (*or assignment, as the case may be,*) for the term therein expressed; and that he is a fit and proper person to be admitted an attorney.

Certificate of
examiners.

Form of.

Questions to
be answered by
clerk, and at-
torney, &c.

Notice of ap-
plication to be
admitted.

To the intent that better information may be obtained, touching the fitness and qualification of persons applying to be admitted attorneys, there are rules, in the King's Bench^a, that "every person who shall intend to apply for admission as an attorney in that court, and who

^a R. T. 31 Geo. III. K. B. 4 Durnf. Durnf. & E. 368. and see Tidd *Prac.* 9 & E. 379. R. T. 33 Geo. III. K. B. 5 Ed. 69.

shall not have been admitted an attorney or solicitor of any other court, shall, for the space of one full term previous to the term in which he shall apply to be admitted, cause his name and place of abode, and also the name or names, and place or places of abode of the attorney or attorneys to whom he shall have been articulated, written in legible characters, to be affixed on the outside of the court of King's Bench, in such place as public notices are usually affixed on, and in the King's Bench office; and also enter, or cause to be entered, in a book to be kept for that purpose, at each of the judge's chambers of this court, his name and place of abode, and also the name and place of abode of the attorney or attorneys to whom he shall have been articulated^a. And there is a similar rule in the Common Pleas^b, directing the notice to be affixed on the outside of the court, in such places as public notices are usually affixed on, for the space of one full term previous to which the party shall apply to be admitted, and to be left, for the like space of time, at each of the judge's chambers of that court, and there fixed up, in some conspicuous place; and that such notice shall likewise be fixed up, for the like time, in the Common Pleas office^c. And, by a general rule of all the courts^d, it is ordered that "three days at the least before the commencement of the term next preceding that in which any person not before admitted, shall propose to be admitted an attorney of either of the courts, he shall cause to be delivered at the *Master's* or *Prothonotary's* office, as the case may be, instead of affixing the same on the walls of the courts, as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode, or service, for the last preceding *twelve* months; and the master or prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned, into an alphabetical table or tables, under convenient heads, and affix the same, on the first day of term, in some conspicuous place, within or near to, and on the outside of each court."

Delivery of, at master's or prothonotary's office.

^a For the effect of a variance in the names of the master and clerk, between the notice of application by a party for admission as an attorney, and his articles of clerkship, see *Ex parte Croft*, 5 Nev. & M. 58.; and for the consequences of not complying with the requisites of the statute, see *Ex parte Woolwright*, 4 Dowl. Rep. 274. 1 Har. & W. 517. 11 Leg. Obs. 61, 2. S. C. *Ex parte Morgan*, 4

Dowl. Rep. 296. 11 Leg. Obs. 86. S. C.

^b R. T. 31 Geo. III. C. P. 2 Marsh. 48. (a.) and see N. M. 2 Geo. II. C. P.

^c Tidd *Prac.* 9 Ed. 69.

^d R. H. 6 W IV. 6 Nev. & M. 3, 4. 1 Har. & W. 639. 2 Bing. N. R. 614. 1 Meeson & W 4, 5. 1 Tyr. & G. 235, 6. 4 Dowl. Rep. 554. 11 Leg. Obs. 256, 7.

Solicitor of treasury, customs, excise, or stamps, &c., allowed to act and practise as such, in all courts, &c.

By the statute 9 Geo. IV. c. 25^a, "whenever any person has been, or shall be appointed solicitor or attorney, on behalf of his Majesty, under the orders and directions of the commissioners of the treasury, customs, excise, or stamps, or under the order and directions of any commissioners, or other persons or person having the management of any other branch of his Majesty's revenue, for the time being, it shall and may be lawful for such person, to act and practise as such solicitor or attorney, under such orders and directions, in all and every court and courts, jurisdiction and jurisdictions, place and places, in any and every part of the united kingdom; any thing in any act of parliament, &c., to the contrary notwithstanding." A suggestion that the defendant defends by *A. B.* who has been appointed solicitor on behalf of his Majesty, and acts as such in this behalf, is a sufficient disclosure to the court, that *A. B.* has authority to act under the above statute^b; and the plaintiff cannot treat the plea as a nullity, although, otherwise than by such suggestion, the record does not shew that the cause concerns matters of revenue^b.

Stamping articles of clerkship, and admitting persons who have served as clerks in *Wales*, or counties palatine.

By the 9 Geo. IV. c. 49^c, "articles of clerkship, &c., under which any person may have served, or become bound to serve, as a clerk, in order to his admission in any of the courts of great sessions in *Wales*, or of the counties palatine of *Chester*, *Lancaster*, or *Durham*, may be stamped, upon payment of the duty of one hundred and twenty pounds; and the person having so served, may thereupon be admitted an attorney or solicitor in any one or more of the courts at *Westminster*: Provided such articles shall have been previously stamped, with a stamp denoting the payment of the duty payable in respect of the same, at the date of such articles of clerkship."

Attornies of *Chester*, and *Wales*, allowed to practise, and be admitted, in superior courts, on certain conditions.

The jurisdiction of the courts of session and Exchequer of *Chester*, and of great sessions in *Wales*, being abolished by the administration of justice Act^d, it was enacted by that statute^e, that "all persons, who, on or before the passing of that act, should have been admitted as attornies, and should then be practising in any of the courts of sessions or great sessions in the county palatine of *Chester*, or in *Wales* respectively, should be entitled, upon the payment of

^a § 1. and see Tidd *Prac.* 9 Ed. 62, 3.

^b *West v. Taunton*, 6 Bing. 404. 4 Moore & P. 79. S. C.

^c § 4. and see Chit. Col. Stat. 77. (i.)

^d 11 Geo. IV. & 1 W. IV. c. 70. and see stat. 34 Geo. III. c. 14. § 4. Tidd *Prac.* 9 Ed. 61, 2.

^e § 16.

"one shilling, to have their names entered upon a roll, to be kept for that purpose, in each of the superior courts of *Westminster*; and thereupon be allowed to practise in such courts, in all actions and suits against persons residing, at the commencement of the suit, within the county of *Chester*, or principality of *Wales*:"^a And that all attornies and solicitors then actually admitted and practising in any of the said courts of sessions, or great sessions in the county palatine of *Chester*, or in *Wales*, respectively, might be admitted as attornies of the said courts at *Westminster*, in like manner as was then or might be thereafter prescribed for the admission of other persons as attornies therein, upon payment of such sum for duty, in addition to the sum already paid by them in that behalf, as should, together with such latter sum, amount to the full duty required upon admission of attornies in the said courts at *Westminster*."^b

There are also provisions in this statute^c, for the admission of persons, as attornies of the courts at *Westminster*, who had served, or were then actually serving, under articles, as clerks to attornies or solicitors of the said courts of sessions or great sessions. On the above statute it has been decided, that a party who had been admitted an attorney, but had not actually practised in the court of great sessions in *Wales*, before the passing of the above act, is not entitled to be enrolled under it, as an attorney of the court of King's Bench^d. So, an attorney of the court of great sessions in *Wales*, who had once been in practice, but had discontinued practising more than six months before the passing of the act, was held not to be entitled to be admitted under it^e.

Provisions, as to admission of their clerks.

In the Exchequer of Pleas, the business of the suitors was formerly transacted by the sworn and side clerks only, (the former of whom acted as attornies, and the latter were allowed to practise in their names,) either as *principals*, immediately employed by the parties, or as *agents* of attornies so employed, and admitted in either of the other courts at *Westminster*^f: But, by the administration of justice Act^g, it is enacted, that "all persons admitted or admissible to practise as attornies in the courts of King's Bench and Common Pleas, shall be admissible, in like manner, as attornies of the court

Business of suitors, how formerly transacted in Exchequer.

Attornies of King's Bench, and Common Pleas, admissible to practise in Exchequer.

^a For a decision on this clause, see *Davies* demandant, *Dawkins* tenant, *Evans* vouchee, 4 Moore & P. 789. 7 Bing. 140. 1 Dowl. Rep. 206. S. C.

^b § 17.

^c §§ 16, 17. For these provisions, see *Tidd Sup.* 1830. pp. 54, 5.

^d *Ex parte* Read, 1 Barn. & Ad. 957.

^e *Ex parte* Garratt, 2 Dowl. Rep. 371. 2 Crompt. & M. 410. 4 Tyr. Rep. 282. S. C.

^f *Tidd Prac.* 9 Ed. 157, 8.

^g 11 Geo. IV. & 1 W. IV. c. 70. § 10. and see *Tidd Prac.* 9 Ed. 72, 3. 1 Rep. C. L. Com. 23, 4.

"of Exchequer, and be admitted and allowed to practise there as such, upon application to the barons of that court, without being obliged to employ any clerk in court, in the capacity of attorney of the court of Exchequer, any law or usage to the contrary notwithstanding."

How admitted.

When an attorney has been admitted in either of the other courts at *Westminster*, and is desirous of being admitted in the court of Exchequer, it is necessary that he should apply to a baron for a *fiat* for that purpose; which is obtained, by producing his admission to practise as an attorney, in either of the other courts. This *fiat* must be taken to the master, together with an *affidavit*, stating the payment of the duty on the articles; also the names and descriptions of the parties to such articles, when they were enrolled, and in what court, and when the attorney was admitted; and, if there has been any assignment of the articles, the name and description of the parties, and the time of enrolment thereof, must also be stated^a: The attorney may then be admitted, and sworn in at the sitting of the court, in term time. And a rule of court was made in the Exchequer^b, that "in all actions which, before the first day of the then present term, were pending in this court, the parties, plaintiffs or defendants, shall and may be at liberty to apply to one of the barons of this court, for an order appointing any person, who shall then be an attorney of this court, to be his or her attorney, in further prosecuting or defending such action, upon undertaking to pay the sworn or side clerk previously employed by him, his costs incurred in such action, to be taxed, if required, by the master; and that service of such order on the opposite party or parties, or his or her attorney, shall be sufficient notice to him or them of such appointment." If an attorney act in the Exchequer, without being admitted of that court, proceedings may be stayed; and he will be ordered to pay the costs^c: and it is not too late to apply, even after issue joined, and notice of trial given^c.

Appointment of attorneys, to prosecute or defend actions previously commenced.

Entry of attorneys' names and places of abode, in Exchequer.

There is also a rule in the Exchequer^d, similar to that in the King's Bench, of *Hil.* 8 Geo. III.^e, that "the clerk of the pleas, or his deputy, shall forthwith cause to be prepared, a proper alpha-

^a Dax Ex. Pr. 11, 12. And for the form of the affidavit, see *id.* Append. xxxvi. And as to the admission of attorneys in general, in different courts, see Tidd *Prac.* 9 Ed. 72, 3.

^b R. M. 1 W. IV. reg. I. § 5. 1 Cromp. & J. 272, 3. 1 Tyr. Rep. 157.

^c Constable v. Johnson, 1 Cromp. & M. 88. 1 Dowl. Rep. 598. 5 Leg. Obs. 241. S. C. and see Latham v. Hyde, 1 Cromp. & M. 128. 1 Dowl. Rep. 594. S. C.

^d R. M. 1 W. IV. reg. II. § 8. 1 Cromp. & J. 277, 8. 1 Tyr. Rep. 160.

^e Tidd *Prac.* 9 Ed. 71, 2.

betical book, for the purposes after mentioned; and that the same shall be publicly kept at the office of the clerk of the pleas, to be there inspected by any attorney admitted to practise in that court, or his clerk, without fee or reward; and that every attorney admitted in this court, and residing in *London*, or within *ten* miles of the same, shall forthwith enter in such book, in alphabetical order, his name and place of abode, or some other proper place, in *London*, *Westminster*, or the borough of *Southwark*, or within *one* mile of the said office, where he may be served with notices, summonses, orders, and rules, in causes depending in this court; and every attorney hereafter to be admitted, and practising and residing as aforesaid, shall, upon his admission, make the like entry; and as often as any such attorney shall change his place of abode, or the place where he may be served with notices, summonses, orders, and rules, he shall make the like entry thereof in the said book: And that all notices, summonses, orders and rules, which do not require personal service, shall be deemed sufficiently served on such attorney, if a copy thereof be left at the place lastly entered in such book, with any person resident at or belonging to such place; and if any such attorney shall neglect to make such entry, then the fixing up of any notice, or the copy of any summons, order or rule for such attorney, in the said office of pleas, shall be deemed as effectual and sufficient, as if the same had been served at such place of residence as aforesaid." This rule extends to all proceedings, though only notices, summonses, orders, and rules, are mentioned therein^a: And if the attorney reside beyond *one* mile, and within *ten* miles of *London*, he must enter some proper place, within *one* mile of the Exchequer office; and entering his place of abode is, in such case, not a sufficient compliance with the rule^a.

Service of notices, &c. not requiring personal service.

The rule for re-admitting an attorney, is a rule to shew cause, founded on an *affidavit*, stating the payment of the duty on the articles of clerkship, the admission under them, and up to what time the attorney obtained his certificate. It must also be sworn, that he has since discontinued to practise, for otherwise he might be criminally culpable^b; and, where a considerable time has elapsed, the reason of his ceasing to take out his certificate must be stated, and how he has since been employed, in order to shew that he has not been employed in any manner that may unfit him for the duties of his

Re-admission of attorneys.

^a *Blackburn v. Peat*, 2 Dowl. Rep. 293.

^b *Ex parte Bartlett*, 1 Chit. Rep. 207.

2 Crompt & M. 244. 4 Tyr. Rep. 38. and see *id.* 316. 646.
S. C.

profession^a. The affidavit then states, that a term's notice has been given, when necessary, of his intention to apply to the court; and that notice of his name and place of abode, &c., has been served on the solicitor to the commissioners of stamp duties^b. And, by a late rule of all the courts^c, after reciting that it is expedient, upon the re-admission of attorneys, that the judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted, discontinue to practise, and as to their conduct and employment during the time of such discontinuance; it is ordered, that "at the time of giving the usual notice of the intention to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted, with the master or prothonotary, as the case may be; which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also, at the same time, cause to be left a copy of such affidavit, with the clerk of the Lord Chief Justice of the court of King's Bench: and the rule for the re-admission of such person, shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left, in compliance with this rule." As an attorney may be struck off the roll of the Common Pleas, upon reading a rule for striking him off the roll of the King's Bench^d, so he may be re-admitted in the former, upon reading a rule for his re-admission in the latter court^e.

^a *Ex parte Saunders*, 2 Smith, R. 155.

Ex parte Mayer, 5 Moore, 141.

^b *Tidd Prac.* 9 Ed. 80. and see further as to the re-admission of attorneys, *Id.* 78, 9.

^c R. H. 6 W. IV. 6 Nev. & M. 4. 2 Bing. N. R. 614, 15. 1 Meeson &

W. 5. 1 Tyr. & G. 236. 4 Dowl. Rep.

555. 11 Leg. Obs. 257.

^d *In re Smith*, 1 Brod. & B. 522. 4 Moore, 319. S. C.

^e *Ex parte Yates*, 9 Bing. 455. 2

Moore & S. 618. 1 Dowl. Rep. 724.

S. C. *Ex parte Parry*, 12 Leg. Obs. 75.

CHAP. IV.

Of the MEANS of COMMENCING PERSONAL ACTIONS in the SUPERIOR COURTS of LAW at WESTMINSTER, &c.; and the PROCESS in general, for bringing the DEFENDANT into COURT: and of the PROSECUTION and DEFENCE of ACTIONS, &c. by or against INFANTS, and PAUPERS.

BEFORE the statute 2 W. IV. c. 39. the means of commencing *personal* actions in the court of King's Bench, conformable to its jurisdiction, were *first*, by *original writ*, which was threefold: 1. against common persons^a; 2. against peers of the realm, and members of the House of Commons^b; 3. against corporations^c, and hundredors^d: *secondly*, by *bill of Middlesex*, or *latitat*^e: *thirdly*, by *attachment* of privilege, at the suit of attornies, and officers of the court^f; and *fourthly*, by *bill*; which was of three kinds: 1. against members of the House of Commons^g; 2. against attornies, and officers of the court^h; 3. against prisoners in custody of the sheriffⁱ, &c., or marshal of the King's Bench prison^k.

Means formerly used, for commencing personal actions, in K. B.

In the Common Pleas, the means of commencing personal actions were *first*, by *original writ*, issuing out of Chancery; which was either a *special* original, adapted to the nature of the action, or a *common* original, in trespass *quare clausum fregit*^l. The former, though it might have been had in any case, was only necessary, in the first instance, against peers, corporations, and hundredors¹; the latter not requiring personal service, was sometimes used, when the defendant kept out of the way, so that he could not be arrested, or personally served with process¹: *secondly*, by *capias quare clausum fregit*, founded on a supposed original, which was the common mode of

In C. P.

^a Tidd Prac. 9 Ed. 102, &c.

^b Id. 116, &c.

^c Id. 121.

^d Id. 122.

^e Id. 145, &c.

^f Id. 319, &c.

^g Id. 116, &c.

^h Id. 321, &c.

ⁱ Id. 341, &c.

^k Id. 91. 353, &c.

^l Id. 91. 104.

commencing actions in that court, and answered to the bill of *Middlesex* or *latitat* in the King's Bench ^a: *thirdly*, by *attachment* of privilege, at the suit of attornies, and officers of the court ^b: *fourthly*, by *bill*, which was two-fold; first, against attornies, and officers ^c; and secondly, against members of the House of Commons ^d. If a man were in the *Fleet*, it seems that a plaintiff might formerly have had a *bill of debt* against him, in the same manner as in the King's Bench, against a man in custody of the marshal ^e. In practice, actions against prisoners in custody of the warden of the *Fleet*, were commenced in the same manner as those against other persons, by *original writ* ^f.

In Exchequer.

In the Exchequer of Pleas, the means of commencing personal actions were, *first*, by *subpoena ad respondendum*, which was a process directed to the defendant, analogous to the *subpoena* in Chancery, or on the equity side of the Exchequer ^g: *secondly*, by *venire facias ad respondendum*, which was in the nature of an original writ, and was the process used at common law, against persons having privilege of parliament ^h: *thirdly*, by *quo minus capias*, which answered to the bill of *Middlesex* or *latitat* in the King's Bench, and *capias quare clausum fregit* in the Common Pleas ⁱ: *fourthly*, by *venire facias*, or *capias* of privilege, at the suit of attornies, and officers of the court ^k; and *lastly*, by *bill*, which was three-fold; first, against attornies, and officers ^l; secondly, against members of the House of Commons, on the statute 12 & 13 W. III. c. 3. § 2 ^m; and thirdly, against prisoners, in custody of the sheriff, &c. ⁿ, or warden of the *Fleet* ^o.

Abolished by
stat. 2 W. IV.
c. 39.

The process formerly used for the commencement of *personal* actions, in the superior courts of law at *Westminster*, having been found, by reason of its great variety and multiplicity, very inconvenient in practice ^p, was abolished, and other writs substituted in lieu thereof, by the statute 2 W. IV. c. 39. intituled "*An Act for Uniformity of Process, in personal Actions, in his Majesty's Courts of law at*

^a Tidd *Prac.* 9 Ed. 91. 153.

^b *Id.* 320.

^c *Id.* 323.

^d *Id.* 116, &c.

^e *Id.* 91, 2.

^f *Id.* 353, &c.

^g *Id.* 156, 7.

^h *Id.* 155, 6.

ⁱ *Id.* 157.

^k *Id.* 92. 321.

^l *Id.* 92. 325.

^m *Id.* 116, &c.

ⁿ *Id.* 341, &c.

^o *Id.* 92. 353, &c.

^p Preamble to stat. 2 W. IV. c. 39.

And for the variety and multiplicity of process in *personal* actions, previous to that statute, and the inconveniences attending the same, see the first Report of the Common Law Commissioners, pp. 70 to 101. 121, &c. 152, &c.

Westminster." The writs authorized by that statute, and which are now used for the commencement of *personal* actions, in any of the said courts, in the cases to which such writs are applicable, are

Writs authorized by that statute, for commencement of personal actions.

I. A writ of *summons*, which is of two kinds: 1. In ordinary cases, where the action is not of a bailable nature, or it is not intended to hold the defendant to special bail: 2. Against members of parliament, to enforce the provisions of the statute 6 Geo. IV. c. 16. § 10.

II. A writ of *capias*, when the defendant is at large, or in custody of the sheriff, &c. and it is intended to hold him to special bail.

III. A writ of *detainer*, when the defendant is in custody of the marshal of the King's Bench, or warden of the Fleet prison, and it is intended to detain him in such custody.

The foregoing being declared by the statute^a, to be the only writs for the commencement of *personal* actions, in any of the courts aforesaid, in the cases to which such writs are applicable, *original* writs are consequently abolished, in *personal* actions against *peers*, *corporations*, and *hundredors*, as well as against *common* persons; together with the mode of commencing such actions by *bill*, against *members* of the House of Commons, *attornies*, and *officers* of the courts, and *prisoners* in custody of the marshal, or sheriff, &c. and by *attachment*, or *capias*, of privilege, at the suit of *attornies* and officers of the courts, in cases to which the writs authorized by the statute are applicable^b; and there is of course an end, in such cases, to the distinction between the proceedings by *original* writ and by *bill*^c. It should be observed, how-

Original writs, and mode of proceeding by bill, &c. in what cases abolished.

^a 2 W. IV. c. 39. § 21.

^b *Darling v. Gurney*, 2 Dowl. Rep. 101. and see *Darlington v. Gurney*, 7 Leg. Obs. 302. *Creed v. Coles*, *Id.* 525. *Excheq.*

^c This distinction chiefly depended on the manner in which *original* writs and the process thereon, and process by *bill*, were made returnable; and on the mode of computing the time allowed for particular purposes, in the course of the suit. *Original* writs, and the process thereon, were formerly made returnable on *essoign* or *general* return days, as in eight days of St. Hilary, &c., of which there were four in each term, except *Easter*, which had five; but process by *bill* was made returnable on *particular* return days, as on *Monday* (or other day of the week) next after eight days of St. Hilary, &c. The *essoign* or *general*

return days were fixed and regulated by the statutes 11 Geo. IV. & 1 W. IV. c. 70. § 6. and 1 W. IV. c. 3., for which *vide ante*, 42, 3.; and for the *essoign* or *general* return days of *original* writs, &c., as fixed and regulated thereby, *id.* 45. But there was no mention made, in either of these statutes, of *particular* return days, or return days of process by *bill*: Such process, therefore, might have been made returnable on any day of the term, not being *Sunday*: and, with regard to the return days of writs in general, it was deemed sufficient in all cases to describe them by the days of the month on which they happened, as on the — day of — instant, (or next). In computing the time allowed by the practice of the courts for appearing and pleading, &c. the number of days, when not otherwise ex-

Cases to which
stat. 2 W. IV.
c. 39, does not
apply.

ever, that this statute, being confined to *personal* actions, does not apply to such as are purely *real*, as the writ of *right*, *formedon*, &c., or to *mixed* actions, as *dower unde nihil habet*, *quare impedit*, *ejectment*^a, *waste*, &c. But, by a subsequent statute^b, *real* and *mixed* actions are abolished, except the writ of right of *dower*, writ of *dower unde nihil habet*, *quare impedit*, and *ejectment*. These excepted actions, however, may still be commenced by *original* writ; and the action of *ejectment* may be brought, as before the 2 W. IV. c. 39. either by *original* writ, in the King's Bench or Common Pleas^a, or by *bill*, in the King's Bench, or Exchequer of Pleas^c. The action of *replevin* also, which is a *personal* action, and other *personal* actions commenced in *inferior* courts, and removed from thence into *superior* ones, are not within the statute^d; for besides that these actions are not commenced in any of the superior courts of law at *Westminster*, there is a clause in the act^e, that "nothing therein contained shall extend to any cause removed into either of the said courts, by writ of *pone*, *certiorari*, *recordari* " *facias loquelam*, *habeas corpus*, or otherwise." The King, not being named in this statute, is not bound thereby; and consequently may proceed by *scire facias*; which is a *judicial* writ, issuing out of and under the seal of the court of Exchequer^f, for the recovery of a debt due to him on bond, recognizance, or judgment^g, &c. or found by inquisition on an outlawry^h, or extent^h; or by an *original* writ of *scire*

pressed, was in general reckoned *exclusively*, in actions by *bill* in the King's Bench, and *inclusively* in actions by *original* in that court, or in the Common Pleas: (Tidd *Prac.* 9 Ed. 238. 466.) but, by a general rule of all the courts, (R. H. 2 W. IV. reg. VIII. 3 Barn. & Ad. 393. 8 Bing. 307, 8. 2 Crompt. & J. 201.,) it is ordered, that "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on a *Sunday*, *Christmas day*, *Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned *exclusively* of that day also." and see *Rex v. Justices of West Riding of Yorkshire*, 4 Barn. & Ad. 685. 1 Nev. & M. 426. S. C. *Dolan v. Roberts*, 6 Leg. Obs. 205, 6. *per Patteson*, J. *Rex*

v. Goodenough, 2 Ad. & E. 463. *Rex v. Justices of Cumberland*, 4 Nev. & M. 378. 1 Har. & W. 16. S. C. *Buxton v. Spirez*, 1 Tyr. & G. 74. 2 Crompt. M. & R. 601. 1 Gale, 322. *Buxton (or Brixton) v. Squires*, 4 Dowl. Rep. 365. 11 Leg. Obs. 436, 7. S. C.

^a *Doe d. Gillett v. Roe*, 1 Crompt. M. & R. 19. 4 Tyr. Rep. 649. 2 Dowl. Rep. 690. S. C. and see *Doe d. Haines v. Roe*, 2 Moore & S. 619. *Doe d. Fry v. Roe*, 3 Moore & S. 370. *Doe d. Ashman v. Roe*, 1 Scott, 166. 1 Bing. N.R. 258. S. C. *Doe d. Williams v. Williams*, 4 Nev. & M. 259. 2 Ad. & E. 381. S. C. *Doe d. Evans v. Roe*. *Id.* 11.

^b 3 & 4 W. IV. c. 27. § 36. Tidd *Sup.* 1833. p. 12, 13.

^c *Post* Chap. XLV.

^d *Dod v. Grant*, 6 Nev. & M. 70.

^e 2 W. IV. c. 39. § 19. *Anst.* 17, 18.

^f Tidd *Prac.* 9 Ed. 1091.

^g *Id.* 137.

^h *Id.* 1068.

facias, to repeal letters patent^a: And a subject is not prohibited by the statute, from suing out a *scire facias*, which is for some purposes considered as a *personal* action^b, to obtain execution on a judgment, or recognizance^c; or a writ of *error*, or *false judgment*, which are *original* writs^d, for reversing a judgment. It has also been determined, that the statute applies to the *commencement* of actions only, and not to the *continuance* of actions, commenced before it came into operation^e; and that it did not, therefore, prevent the signing of a *pluries* bill of *Middlesex*, in a suit previously commenced^f.

The writs of *summons* and *capias*, it will be observed, are only *primary*, or writs taken out in the first instance, to compel the defendant to appear, or put in and perfect special bail to the action: But besides these, and consequent upon them, other auxiliary writs are authorized by the statute to be issued, for the same purposes. These writs are, 1. The writ of *distringas*, which issues where the defendant has not been personally served with the writ of *summons*, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do, without some more efficacious process^g: 2. The writ of *alias* or *pluries summons*, or *capias*^h, for continuing the cause, if the defendant has not been served therewith, or arrested thereon: 3. The writs of *exigi facias*, and proclamation, &c. for outlawing, or waiving, the defendant, upon the return of *non est inventus* to a writ of *capias*ⁱ, or of *non est inventus*, and *nulla bona*, to a writ of *distringas*^j. When the writ is to be served, it is said to be *serviceable*; and when the defendant is to be arrested thereon, it is of a *baillable* nature.

Primary and auxiliary writs.

Serviceable and baillable writs.

An *infant*, or person under the age of *twenty-one* years, not being capable of appointing an attorney, must sue by his *prochein amy*, or *guardian*^k, unless where he sues as co-executor with others, in which

Infant must sue by *prochein amy*, or *guardian*.

^a Tidd *Prac.* 9 Ed. 1091. 1094.

^b Co. Lit. 290. *b.* 291. *a.* Grey v. Jones, 2 Wils. 251. Pulteney v. Townson, 2 Blac. Rep. 1227. Winter v. Kretschman, 2 Durnf. & E. 46.

^c Tidd *Prac.* 9 Ed. 1096, &c. and see Darlington v. Gurney, 7 Leg. Obs. 302. Excheq.

^d Tidd *Prac.* 9 Ed. 1134. 1141.

^e Storr v. Bowles, 4 Barn. & Ad. 112. 1 Dowl. Rep. 516. S. C. and see Finney (or Firnie) v. Montague, 2 Nev. & M. 804. 5 Barn. & Ad. 877. 7 Leg. Obs. 139,

40. S. C. Dickenson v. Teague, 1 Cromp. M. & R. 241. 4 Tyr. Rep. 450. S. C. Taylor v. Duncombe, 2 Dowl. Rep. 401. 8 Leg. Obs. 137, 8. S. C. *per* Little-dale, J.

^f Stat. 2 W. IV. c. 39. § 3.

^g *Id.* § 10.

^h Houlditch v. Swinfen, 3 Scott, 170.

ⁱ 2 Dowl. Rep. 37. S. C.

^j 2 W. IV. c. 39. § 5.

^k Co. Lit. 135. *b.* 2 Inst. 261. 390. F.N.B. 27. H. 2 Wms. Saund. 5 Ed. 117. *f.* (1.)

Defence by
guardian.

case it is holden, that the executors of full age may appoint an attorney for themselves and the infant, as they make together but one representative^a. An infant *defendant* must, in all cases, appear and defend by *guardian*, even where he is sued as to executor with others^b: and an appearance entered by a plaintiff, for an infant defendant, by an attorney, is irregular; and the subsequent proceedings may be set aside, without costs, even after a writ of inquiry executed^c. In the King's Bench, it was formerly considered, that a special admission of a guardian for an *infant* to appear in one cause, would serve for others^d: But, by a general rule of all the courts^e, "a special admission of *prochein amy*, or guardian^f, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend, in any but the particular action or actions specified."

Security for
costs.

In *ejectment*, when the lessor of the plaintiff is an *infant*, the court will stay the proceedings, until a real and substantial plaintiff be named, or some responsible person undertake for the payment of costs^g: In other actions, an infant plaintiff cannot be compelled to give security for costs, even though his *prochein amy* is sworn to be insolvent^h. But, in a late caseⁱ, where an infant sued by guardian, who was sworn to be in insolvent circumstances, the court of Common Pleas required the latter to give such security, or that his appointment should be revoked. When an infant plaintiff is nonsuited, or has a verdict against him, the *prochein amy* is liable to the payment of costs^k; and if he refuse to pay them on demand, he may be proceeded against by attachment^l. Where an infant sued by *pro-*

Remedy for,
in actions by in-
fants.

^a 2 Wms. Saund. 5 Ed. 212, 18. (6.)

^b *Frescobaldi v. Kinaston*, 2 Str. 784.

^c *Nunn v. Curtis*, 4 Dowl. Rep. 729. 1 Tyr. & G. 500. S. C.

^d *Archer v. Frowde*, 1 Str. 305.

^e R. H. 2 W. IV. reg. I. § 2. 3 Barn. & Ad. 374. 8 Bing. 288. 2 Crompt. & J. 168.

^f In the King's Bench, there is a rule drawn up, on a judge's *fiat*, for the admission of a *prochein amy*, or guardian: In the Common Pleas, there is no rule, but a judge's order only, for such admission: and see *Tidd Prac.* 9 Ed. 100.

^g *Noke v. Windham*, 1 Str. 694. *Throgmorton d. Miller, v. Smith*, 2 Str. 932. *Real v. Macky, Id.* 1206. Anon. 1 Wils. 130. *Golding v. Barlow*, Cowp. 24. *Thrustout d. Dunham, v. Percivall, Barnes*,

183. Bul. N^o. Pri. 111. Ad. Eject. 2 Ed. 314, 15. *Tidd Prac.* 9 Ed. 1232. Append thereto, Chap. XLVI. § 88, 9.; but see Anon. Cowp. 128.

^h Anon. 1 Marsh. 4. *Yarworth v. Mitchel*, 2 Dowl. & R. 423. and see Anon. 2 Chit. R. 359. *Tidd Prac.* 9 Ed. 100.

ⁱ *Mann v. Berthen*, 4 Moore & P. 215.

^k *Grave v. Grave*, Cro. Eliz. 33. *James v. Hatfield*, 1 Str. 548. *Turner v. Turner*, 2 Str. 708. And the *prochein amy* is *prima facie* liable to the plaintiff's attorney for his costs, as well as to the defendant: *Marnell v. Pickmore*, 2 Esp. Rep. 473. *per* Ld. *Kenyon*, Ch. J.

^l *Englefield v. Round*, Cas. Pr. C. P. 32. *Slaughter v. Talbot, Willes*, 190. *Barnes*, 128. Pr. Reg. 102. S. C. *Evans*

chein amy, and there was a verdict and judgment against him, the court, on his being taken in execution for the costs, refused to discharge him on motion, saying, it was matter of error, if costs could not be given^a. And, in a subsequent case^b, where there was no *prochein amy* or guardian, the plaintiff having concealed his infancy, the court would not relieve him. But, from a later case, it appears to be doubtful, whether an infant *plaintiff* is liable to be taken in execution for costs on a nonsuit, or verdict against him^c. It has been adjudged however, that on a verdict for the plaintiff, costs are payable by an infant *defendant*^d: And the court would not discharge an infant defendant, in an action of *slander*, from an execution for damages and costs, although the insolvent court had refused to relieve him, because, on account of his infancy, he was unable to make the assignment of property required by the 7 Geo. IV. c. 57. § 11^e.

Against infants.

When the plaintiff is a *pauper*, and will swear that he is not worth *five* pounds, after all his debts are paid, except his wearing apparel, and the subject matter of the action^f, he may be admitted to sue in *formâ pauperis*; and upon his being so admitted, an attorney and counsel shall be assigned him, pursuant to the statute 11 Hen. VII. c. 12; and he shall be permitted to carry on the proceedings *gratis*, without using stamps, or paying fees to the officers of the court, unless he obtain a verdict for more than *five* pounds; and then the officers it is said, shall be paid their court fees^g, and for passing the record, &c. But the defendant in a *civil* action, is never allowed to *defend* it as a pauper^h. In the King's Bench, however, a prisoner, against whom a bill of indictment has been found, for *felony*, which was re-

Pauper what, and when and how admitted to sue in *formâ pauperis*, and when not.

Defence of actions, and prosecutions, against.

^v Davis, 1 Crompt. & J. 460. 1 Tyr. Rep. 345. S. C.

^a Gardiner v. Holt, 2 Str. 1217.

^b Finley v. Jowle, 13 East, 6.

^c Dow v. Clark, 2 Dowl. Rep. 302, 3. 1 Crompt. & M. 860. 3 Tyr. Rep. 866. S. C. and see Turner v. Turner, 2 Str. 708. Hul. Costs, Chap. III. § 4.

^d Anderson v. Warde, Dyer, 104. Hamlen v. Hamlen, 1 Bulst. 189. Gardiner v. Holt, 2 Str. 1217.

^e Defries v. Davies, 3 Dowl. Rep. 629. 1 Hodges, 103. 1 Scott, 594. 1 Bing. N. R. 692. 10 Leg. Obs. 158. S. C.

^f R. H. 3 & 4 Jac. II. reg. I. (a.) Hul. Costs, 2 Ed. 222.; but see 1 Lil. P. R. 633., where the sum is said to be ten pounds.

^g James v. Harris, 7 Car. & P. 257. per Williams, J.; but see Gougenheim v. Lane, 4 Dowl. Rep. 482, where it was doubted by Mr. Baron Parke, whether the officers are entitled to their fees from a pauper, even if *five* pounds are recovered.

^h Hul. Costs, 2 Ed. 288, 9. Anon. Barnes, 328. and see Tidd Prac. 9 Ed. 97.

moved into that court by *certiorari*, has been allowed to defend in *formd pauperis*^a: But that court will not allow a party to *prosecute in formd pauperis*, on the common affidavit of poverty: special grounds must be laid for such application^b. In the Exchequer, the court will admit a party to defend in *formd pauperis*, on an information under the *excise* laws, on the common affidavit, that he is not worth *five* pounds, over and above his wearing apparel^c: But where a pauper defendant applied to the court, that he might be allowed a copy of the information *gratis*, the court held, that they could not grant a copy of the information, and that the defendant was only entitled to have the information read over to him by the officer, and that he might either plead *instante*, or at a future day^c: And in that court it is a rule^d, that "no person shall be admitted in *formd pauperis*, unless the attorney to be assigned, or his clerk, attend a baron, with a petition for his admission; and that no counsel shall be assigned, unless such counsel only who hath certified the cause of such action and petition."

^a *Rex v. Page*, 1 Dowl. Rep. 507.
Rex v. Sims, 5 Leg. Obs. 144. S. C. *per*.
Littledale, J.

^b *Rex v. Wilkins*, 1 Dowl. Rep. 536.
per Parke, J.

^c *Attorney-General v. Dummie*, 2
 Crompt. & M. 393. 4 Tyr. Rep. 284.
 S. C.

^d R. E. 3 Geo. I. in *Scac.* Carrington's Rules and Orders, 81, 2.

CHAP. V.

Of the WRITS of SUMMONS, and DISTRINGAS.

IN treating of the process in *personal* actions, as prescribed by the uniformity of process Act ^a, it is proposed to consider, in the present Chapter, the writs of *summons* and *distringas*, for bringing the defendant into court, in actions not bailable; which are analogous to the process before used on *original* writs at common law, or by the statutes 51 Geo. III. c. 124, and 7 & 8 Geo. IV. c. 71 ^b.

Process in personal actions, how considered.

The writ of *summons* is a judicial writ, founded on the uniformity of process act ^c, by which it is enacted, that “the process in all *personal* actions, commenced in either of the superior courts, in cases “where it is not intended to hold the defendant to special bail, or to “proceed against a member of parliament, according to the provisions “contained in the statute passed in the sixth year of the reign of his “late Majesty King George the Fourth ^d, intituled *An Act to amend “the Laws relating to Bankrupts*, shall, whether the action be brought “by or against any person entitled to the privilege of peerage, or of “parliament, or of the court wherein such action shall be brought, or “of any other court, or to any other privilege, or by or against any “other person, be according to the form contained in the schedule to “that act, (2 W. IV. c. 39.) annexed, marked No. 1.; and which “process may issue from either of the said courts, and shall be called “a writ of *summons*.” ^e This writ is considered as the commencement of the action, for all purposes ^f; and may, it seems, be issued, in cases not bailable, against prisoners in custody of the sheriff, &c.

Writ of summons what, and in what cases it lies.

Commencement of action.

Against prisoners.

^a 2 W. IV. c. 39.

^b Tidd *Prac.* 9 Ed. 109, &c.

^c 2 W. IV. c. 39. § 1.

^d 6 Geo. IV. c. 16. § 10.

^e Append. to Tidd *Sup.* 1833. p. 262,

3.

^f *Alston v. Underhill*, 1 *Cromp. & M.* 492. 3 *Tyr. Rep.* 427. 2 *Dowl. Rep.* 26. S. C. and see *Thompson v. Dicus*, 1

Cromp. & M. 768. 3 *Tyr. Rep.* 873. 2

Dowl. Rep. 93. S. C. *Rees v. Morgan*,

3 *Nev. & M.* 205. 5 *Barn. & Ad.* 1035.

S. C. *Braithwaite v. Lord Montford*, 2

Cromp. & M. 408. 4 *Tyr. Rep.* 276. S. C.

Pierce v. Fothergill, 2 *Bing. N. R.* 167.

2 *Scott*, 334. 1 *Hodges*, 251. S. C. but

see *Steward v. Layton*, 3 *Dowl. Rep.* 430.

9 *Leg. Obs.* 172. S. C.

or of the marshal of the King's Bench, or warden of the *Fleet* prison, as well as against defendants who are not in custody.

Direction and
form of writ.

The writ we are now speaking of, is directed to the defendant; commanding him, that within *eight* days after the service of the writ on him, *inclusive* of the day of such service, he do cause an appearance to be entered for him, in the court in which the action is brought, in an action on promises, (*or of debt, &c. as the case may be,*) at the suit of the plaintiff; and requiring the defendant to take notice, that in default of his so doing, the plaintiff may cause an appearance to be entered for him, and proceed therein to judgment and execution ^a. In this writ, and every copy thereof, the place and county of the residence, or, supposed residence of the defendant, or wherein he is, or shall be supposed to be, are required to be mentioned ^b. The street and county, however, in which a defendant resides, is a sufficient description in a writ of *summons* ^c; and it is not necessary to give any *addition* to the defendant, in such writ ^d. The form of the writ prescribed by the act must, in general, be strictly adhered to: Therefore, where the name of the plaintiff was not stated in the writ of *summons*, as the person who would enter an appearance for the defendant, if he did not comply with the exigency of the writ, the court set it aside for irregularity ^e. But where, in an action against several defendants, the writ stated that, in default of their entering an appearance themselves, the plaintiff "may cause an appearance to be entered for *you*," without adding "and *each* of you," the judge held, that the words "for *you*" must be taken distributively, as applying to each of the defendants, and therefore that the notice was sufficient ^f. And where the name of the chief clerk had been omitted on the writ, the judge refused to set it aside for irregularity; it being quite sufficient for a person suing out writs of *summons*, to adopt the form given in the schedule to the act ^g.

Form to be
strictly adhered
to.

^a Sched. to stat. 2 W. IV. c. 39. No.

1. Append. to Tidd *Sup.* 1833. p. 262, 3.

^b Stat. 2 W. IV. c. 39. § 1. and see Wright v. Warren, 3 Moore & S. 164. 2 Dowl. Rep. 724. S. C. per Alderson, J. French v. Gregson, 9 Leg. Obs. 138, 9. Jelks v. Fry, 3 Dowl. Rep. 37. S. C. per Littledale, J. Lewis v. Newton, 1 Tyr. & G. 72. 1 Gale, 288. 2 Cromp. M. & R. 732. 4 Dowl. Rep. 355. 11 Leg. Obs. 374. S. C.

^c Cooper v. Wheale, 4 Dowl. Rep. 281. 1 Har. & W. 525. 11 Leg. Obs. 133, 4.

S. C.

^d Morris v. Smith, 1 Gale, 103. 2 Cromp. M. & R. 120. 5 Tyr. Rep. 523. 3 Dowl. Rep. 698. 10 Leg. Obs. 255. S. C.

^e Smith v. Crump, 1 Dowl. Rep. 519. 5 Leg. Obs. 384, 5. S. C. per Parke, J. 3 Dowl. Rep. 273. S. C. cited.

^f Engleheart v. Eyre, (*or Edwards*), 2 Dowl. Rep. 145. 6 Leg. Obs. 138. S. C. per Patteson, J.

^g Wilson v. Joy, 2 Dowl. Rep. 182. 6 Leg. Obs. 413, 14. S. C. per Taunton, J.

The writ of *summons* should regularly contain the christian and surnames of the parties: But a *misnomer*, or mistake in their names, cannot now be pleaded in abatement; it being enacted, by the statute 3 & 4 W. IV. c. 42^a, that "no plea in abatement for a *misnomer* shall be allowed in any personal action; but that in all cases in which a *misnomer* would, but for that act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an *affidavit* of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit." This act having abolished pleas of *misnomer* in personal actions, it has been doubted, whether a defendant, arrested by a wrong christian name, can apply to be discharged on motion^b; but it has since been decided that he may, if due diligence has not been used, according to the rule of H. 2 W. IV. reg. 1. § 32^c. No advantage, however, can be taken at the trial, of a *misnomer* of the *plaintiff*, though there be a person of the name erroneously used; it being a question of fact, who is the real plaintiff^d.

In describing the defendant, if he has a name of dignity, as Duke, Marquis, Earl, &c. it should regularly be stated in the writ; but it is not necessary, in an action against a peer, or member of the House of Commons, to describe him as having privilege of peerage, or of parliament^e. In actions against *corporations* aggregate, they must be sued by their corporate name^f; and when *hundredors* are sued on the statute 7 & 8 Geo. IV. c. 31., they must be described as "men inhabiting within the hundred g, &c.": but, with these exceptions, it is sufficient, in general, to describe the defendant by his christian and surname, without any further addition. And, in an action not bailable, if the plaintiff sue *qui tam*^h, or as *executor* or *administrator*ⁱ, or

Names of parties.
Misnomer in.

Description of
defendant.

Special character
of parties.

^a § 11. And see same statute, § 12, as to the *initials* of christian names, in bailable process.

^b *Callum (or Cullum) v. Leeson*, 2 Dowl. Rep. 381. 2 Crompt. & M. 406. 4 Tyr. Rep. 266. S. C.

^c *Ladbrook v. Phillips*, 1 Har. & W. 109. *per Patterson, J.*

^d *Moody v. Aslatt, (or Oslatt,)* 1 Crompt. & R. 771. ^e Tyr. Rep. 492. 1 Gale, 47. 3 Dowl. Rep. 486. 9 Leg. Obs. 511. S. C.

^e *Cantwell v. Earl of Stirling*, 1 Moore & S. 297. 8 Bing. 174. S. C.

^f 2 Inst. 666. Com. Dig. tit. *Pleader*, 2 B. 1.

^g *Tidd Prac. Append.* 9 Ed. 36.

^h *Weavers' Company v. Forrest*, 2 Str. 1232. *Lloyd v. Williams*, 2 Blac. Rep. 722. 3 Wils. 141. S. C.

ⁱ *Ashworth v. Ryal*, 1 Barn. & Ad. 19. and see *Ilsley v. Ilsley*, 2 Crompt. & J. 330, 31. 2 Tyr. Rep. 214. S. C.

assignee of a bankrupt^a, &c. the process need not state the character in which he sues; nor, in an action against an *executor* or *administrator*, &c. the character in which he is sued^b. It has been doubted, however, whether the service of a writ of *summons*, in which an executor is not described in his representative character, is notice to him of the commencement of an action against him in that character, so as to render him liable to a *devastavit*, if he pay debts of an equal degree with that sued for, between the service of the writ and filing the declaration^c.

Nature of action. In describing the nature of the action, it is observable that the *forms* in the schedule to the uniformity of process act^d, are applicable only to actions of *assumpsit* and *debt*. These forms, however, must be strictly adhered to: and therefore, where the writ of *summons* in *assumpsit*, was in an action of *trespass on the case upon promises*, instead of an action *on promises*, as prescribed by the schedule, the court set it aside for irregularity^e. But where the writ was in *trespass on the case*, and had no indorsement of the sum demanded, and the particulars of demand, which had been delivered with the notice of declaration, shewed a claim for wages, the court refused to set aside the writ for irregularity, the plaintiff not having declared^f: And the omission of the words "*on promises*," in the copy of a writ of *summons*, is only a ground of setting aside the copy served, and not the writ itself^g. In other actions, it would, it seems, be deemed sufficient to describe the nature of the action generally, as by stating it to be "in an action of *covenant, account, annuity, detinue, trespass on the case, or trespass*." So, where the action was described, in the writ of *summons*, as an action of "*libel*," it was holden to be sufficient^h: and it has been determined, that "*slander*" is a sufficient description of the form of actionⁱ.

When there are several parties.

The *form* of the writ of *summons*, and other writs mentioned in the schedule to the act, is adapted to the case of a *single* plaintiff, or

^a Knowles v. Johnson, 2 Dowl. Rep. 653.

^b Watson v. Pilling, 6 Moore, 66. 3 Brod. & B. 4. S. C.

^c Rees v. Morgan, 3 Nev. & M. 205. 5 Barn. & Ad. 1035. S. C.

^d 2 W. IV. c. 39.

^e King v. Skeffington, 1 Crompt. & M. 363. 3 Tyr. Rep. 318. 1 Dowl. Rep. 686. S. C. and see Ward v. Tummon, 1 Ad. & E. 619. 4 Nev. & M. 876. S. C. Moore v. Archer, 4 Dowl. Rep. 214. 10

Leg. Obs. 382. S. C.

^f Davies (or Addis) v. Jones, 1 Crompt. M. & R. 582. 5 Tyr. Rep. 182. 3 Dowl. Rep. 164. S. C. and see Coldwell (or Caldwell) v. Blake, 3 Dowl. Rep. 656. 1 Gale, 157. 2 Crompt. M. & R. 249. 5 Tyr. Rep. 618. 10 Leg. Obs. 174. S. C.

^g Chalkley v. Carter, 4 Dowl. Rep. 480. 1 Tyr. & G. 210. S. C.

^h Pell v. Jackson, 2 Dowl. Rep. 445. 8 Leg. Obs. 156, 7. S. C. per Parke, J.

ⁱ Davies v. Parker, 2 Dowl. Rep. 537.

defendant only^a; but when there are *several* plaintiffs or defendants in a joint action, all their names must be included therein^b. In actions not bailable, the plaintiff was formerly allowed to join *four* defendants, for *separate* causes of action, in one writ, and to declare against them severally^c: but, by a general rule of all the courts^d, "every writ of *summons*, *capias*, and *detainer*, shall contain the names of all the defendants, if more than one, in the action; and shall not contain the name or names of any defendant or defendants, in more actions than one." And where the names of two defendants, having been inserted in the writ of *summons*, separate proceedings were taken against each, the court held it to be irregular^e. So it is irregular, if a plaintiff make an affidavit of debt, against *two* defendants, and issue a *capias* against both, but declare against *one* only^f. It seems, however, that upon a writ of *summons* against several, the plaintiff may declare against one only; though if he afterwards declare against any other defendant, it will be irregular^g.

Joining several defendants in one writ.

When there are several defendants, one of whom is not meant to be arrested, the plaintiff, or his attorney, is authorized by the statute^h, to order the sheriff, or other officer or person to whom the writ of *capias* shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others; which order shall be duly obeyed by such sheriff, or other officer or person: and such service shall be of the same force and effect, as the service of the writ of *summons* therein before mentioned, and no other. And when there are two defendants, one of whom is at large, and the other in custody of the marshal of the King's Bench, or warden of the *Fleet* prison, it may be necessary to issue two writs; one, of *summons* or *capias*, against the

Case of several defendant, one of whom is served with copy of *capias*.

When one defendant is at large, and the other in custody of marshal &c.

^a Sched. to stat. 2 W. IV. c. 39. No. 1. 3, 4, 5, 6. Append. to Tidd Sup. 1833. pp. 262, 3. 268. 272. 288.

^b See the forms of entering an appearance on serviceable process, (Sched. to stat. 2 W. IV. c. 39. No. 2.) which are adapted to the case of *several* defendants; and see that statute, § 4.

^c Anon. Com. Rep. 74. Holland v. Johnson, 4 Durnf. & E. 695. and see Yardley v. Burgess, *id.* 697. Thompson v. Cotter, 1 Maule & S. 55.

^d R. M. 3 W. IV. reg. 1. 4 Barn. & Ad. 2. 9 Bing. 448. 1 Crompt. & M. 2.; and see R. E. 8 Geo. IV. K. B. 6

Barn. & C. 639. 9 Dowl. & R. 677. Tidd Prac. 9 Ed. 148, 9.

^e Pepper v. Whalley, 1 Bing. N.R. 71. 2 Dowl. Rep. 821. S. C. and see Carson v. Dowding, 1 Har. & W. 507. 4 Dowl. Rep. 297. 11 Leg. Obs. 134. S. C.

^f Woodcock v. Kilby, 1 Meeson & W. 41. 1 Tyr. & G. 301. 4 Dowl. Rep. 730. 12 Leg. Obs. 197. 8. S. C. Belotti v. Barella, 4 Dowl. Rep. 719.

^g Coldwell (or Caldwell) v. Blake, 3 Dowl. Rep. 656. 1 Gale, 157. 2 Crompt. M. & R. 249. 5 Tyr. Rep. 616. 10 Leg. Obs. 174. S. C.

^h 2 W. IV. c. 39. § 4.

defendant who is at large, and the other of *detainer*, against the defendant who is in custody.

Date and *teste*
of writ of sum-
mons, &c.

The rule, with regard to the date and *teste* of writs of *summons*, &c. is, that "every writ, issued by authority of the act, shall bear "date on the day on which the same shall be issued^a; and shall be "tested in the name of the Lord Chief Justice, or Lord Chief Baron, "of the court from which the same shall issue; or, in case of a "vacancy of such office, then in the name of a *senior puisne* judge of "the said court;"^b which requisite is not satisfied, by a day being *indorsed* on the writ^c: and a writ of *summons*, bearing date on a *Sunday*, is a nullity^d. There is no particular time appointed for the return of the writ of *summons*: but the defendant is required thereby, to cause an appearance to be entered for him, in the court out of which the writ issued, within *eight* days after the service of the writ, inclusive of the day of such service^e. A *memorandum* is required to be subscribed to the writ of *summons*, stating that it is to be served within *four* calendar months from the date thereof, including the day of such date, and not afterwards^f; and it must be indorsed with the name and place of abode of the plaintiff, or his attorney, by whom the same was issued^g, and the amount of the debt and costs claimed by the plaintiff^h: but an indorsement on a writ of *summons*, that the writ was issued by *E. F.* of, &c. "attorney for the said *plaintiff*," is sufficientⁱ.

When to be re-
turned.

Memorandum,
and indorse-
ments thereon.

From what
court, and by
what officer,
writ is issued.

The writ of *summons* may issue from either of the superior courts of law at *Westminster*^k; and is required, by the uniformity of process act^k, to be issued by the officer of the courts respectively, by whom

^a The writs of *exigent* and proclamation, however, appear to be exceptions to this rule. *Post*, 93. and see *Lewis v. Davison*, 1 *Crompt. M. & R.* 655. 658. 5 *Tyr. Rep.* 198. 3 *Dowl. Rep.* 272. 275. S. C. And the statute seems to have superseded the necessity of the officer's setting down, upon the writ or process for arresting the defendant, the day and year of his signing the same, as required by the statutes 5 & 6 *W. & M. c.* 21. § 4. and 9 & 10 *W. III. c.* 25. § 42; and see stat. 6 *Geo. I. c.* 21. § 54. *Tidd Prac.* 9 *Ed.* 158.

^b Stat. 2 *W. IV. c.* 39. § 12.

^c *Anon.* 1 *Dowl. Rep.* 654. and see *Millar v. Bowden*, 1 *Price, N. R.* 104. 1

Crompt. & J. 563. 2 *Tyr. Rep.* 112. S. C.

^d *Hanson v. Shackelton*, 4 *Dowl. Rep.* 48. 1 *Har. & W.* 342. 10 *Leg. Obs.* 476. S. C.

^e Sched. to stat. 2 *W. IV. c.* 39. No. 1. *Append. to Tidd Sup.* 1833. p. 262, 3.

^f Sched. to stat. 2 *W. IV. c.* 39. No. 1.

^g Stat. 2 *W. IV. c.* 39. § 12. *Post*, 97, 8.

^h *R. H.* 2 *W. IV. reg.* II. 3 *Barn. & Ad.* 390. 8 *Bing.* 305, 6. 2 *Crompt. & J.* 199. *Post*, 100, 101.

ⁱ *Hennah v. Wyman*, 1 *Gale*, 105. 5 *Tyr. Rep.* 792. 2 *Crompt. M & R.* 239. S. C.

^k 2 *W. IV. c.* 39. § 1.

process serviceable in the county therein mentioned, hath been heretofore issued from such court: And there is a clause in the act^a, that "it shall and may be lawful to and for the judges of each of the said courts, from time to time, to make such rules and orders, for the government and conduct of the ministers and officers of their respective courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of that act, as such judges may think fit and reasonable; provided always, that no additional charge be thereby imposed on the suitors." Under this clause, a rule was made by the judges of the court of King's Bench^b, that "all writs of *summons*, *distringas*, *capias*, and *detainer*, issued out of that court, in the county of *Middlesex*, should be issued, signed, and sealed, by the signer of the bills of *Middlesex*; and that all such writs, issued in any other county, should be issued and signed by the signer of the writs in the King's Bench office, and sealed by the sealer of the writs, until further order." But the signing, sealing, and issuing of writs are now regulated by the statute 3 & 4 W. IV. c. 67^c, by which it is enacted, that "so much of the act passed in the second year of his majesty's reign^d, as provides that the writ of *summons* therein mentioned shall be issued by the officer of the said courts respectively, by whom process serviceable in the county therein mentioned, hath been heretofore issued from such court, shall be, and the same is thereby repealed; and that from and after the passing of that act, all writs of *summons*, *distringas*, *capias*, and *detainer*, issued into the county of *Middlesex*, from the court of King's Bench, shall be signed, sealed, and issued, and the fees thereon shall be taken and accounted for, by the same person or persons, and in like manner, as all other writs of *summons*, *distringas*, *capias*, or *detainer*, issued from the said court of King's Bench, under and by virtue of the said recited act; any law, custom, or usage to the contrary notwithstanding." In the Common Pleas, it is not necessary for the filacer to sign his name to a writ of *summons*^e: if he impress upon it the stamp of the court, it is sufficient^e. In the Exchequer, writs are signed by a *master* and *prothonotary*, in the name of the clerk of the pleas.

Rules to be made by judges of each court, for government of their own officers.

Rule thereon, for issuing, signing, and sealing writs, in K. B.

Signing, &c. now regulated by stat. 3 & 4 W. IV. c. 67.

Writs issued into *Middlesex*, how signed, &c. in K.B. and fees in what manner accounted for.

Stamping writs, in C. P. and signing them, in Exchequer.

^a Stat. 2 W. IV. c. 39. § 18. *Ante*, 27, 8.

^b R. M. 3 W. IV. K. B. 4 Barn. & Ad. 8.

^c § 1. and see *Finney (or Firnie) v.*

Montague, 2 Nev. & M. 804. 5 Barn. & Ad. 877. 7 Leg. Obs. 139, 40. S. C.

^d 2 W. IV. c. 39. § 1.

^e *Burt v. Jackson*, 3 Moore & S. 552.

2 Dowl. Rep. 747. S. C.

Præcipe for writ
of summons, &c.

Costs of writs.

Fees for signing
and sealing writs
of summons, &c.

Altering writ.

At the time of issuing the writ of *summons*, and every other writ issued under the authority of the uniformity of process act, it is usual for the plaintiff's attorney, though not required thereby, to deliver to the officer by whom it is issued, a *præcipe*^a, or note of instructions, stating the county, nature of the writ, names of the parties, and cause of action, concisely, with the name of the plaintiff's attorney, and date. The costs to be allowed and charged for the writs authorized to be issued for the commencement of personal actions, are directed by the act^b, to be the same as for writs of *latitat*: And, by a general rule of all the courts^c, "a fee of *two shillings and six pence* is allowed to be taken, for signing all writs for compelling an appearance, whether of *summons*, *distringas*, *capias*, or *detainer*, and whether the same shall be the first writ, or an *alias* or *pluries* writ; and whether the same shall issue into the same county as the preceding writ, or into a different county; and a fee of *seven pence* for sealing the same."

A plaintiff cannot alter his writ after service^d; and a notice not to appear to the copy of the writ first served, will not cure the defect^d. Where the writ of *summons*, which had been originally issued into one county, was afterwards, without being resealed, altered, by the substitution of another, the court set aside the proceedings, on payment of the debt *without costs*; although the defendant had, before taking the objection, obtained a judge's order for staying the proceedings, on his undertaking to pay the debt *and costs*, which order had afterwards been made a rule of court^e. So, where the demandant sued out a writ of *right* in *December* 1834, returnable in *January* 1835, and he altered the return, and resealed the writ, every term till *November* 1835, when it was served on the tenant, the court set aside the service^f; and they refused to re-open the rule, upon an affidavit that the demandant's attorney had been informed by the cursitor, that it had been the invariable and immemorial practice in his office to reseat writs, when presented for that purpose, within *four terms* of the *teste*^g. But, on a motion to set aside a writ of *right*, on the ground that it had been re-sealed after service of a *sum-*

^a For the form of a *præcipe* for a writ of *summons*, see Append. to Tidd *Sup.* 1833, p. 262.

^b Stat. 2 W. IV. c. 39. § 21.

^c R. M. 3 W. IV. reg. 2. 4 Barn. & Ad. 2. 9 Bing. 443. 1 Crompt. & M. 2.

^d Glenn v. Wilks, 4 Dowl. Rep. 322. Anon. 11 Leg. Obs. 164, 5. S. C.

^e Siggers v. Sansom, 3 Moore & S. 194. 2 Dowl. Rep. 745. S. C. but see Miller v. Miller, 2 Bing. N. R. 66. 2 Scott, 116. 4 Dowl. Rep. 144. 1 Hodges, 185. S. C.

^f Leigh v. Leigh, 2 Bing. N. R. 464. 2 Scott, 666. 1 Hodges, 411. S. C.

^g Same v. Same, 2 Scott, 668.

mons, the writ not having been returned, the court of Common Pleas, as having no jurisdiction, refused to interpose^a. The original writ, however, having been superseded in Chancery^b, the court of Common Pleas afterwards set aside the *grand cape*, issued pending the proceedings in equity, but without costs^c.

If the defendant has not been personally served with the writ of *summons*, it may be continued by *alias*^d, and *pluries*^d, as the case may require^e. These writs, which are seldom necessary, except for preventing the operation of the statutes of limitations, are directed to the defendant; commanding him, (as *before*, or as *theretofore* he was commanded,) that within *eight* days after the service of the writ on him, *inclusive* of the day of such service, he do cause an appearance to be entered, &c. (as in the *first writ of summons*^f). In these writs, the place and county of the residence, or supposed residence of the defendant, or wherein he is, or may be supposed to be, should be inserted, as in the former writ^g; and there should be the like *memorandum* and *indorsements* thereon, as on that writ^h. The *alias* and *pluries* writs are issued, on proper *præcipes*ⁱ: And, by a general rule of all the courts^k, they may, if the plaintiff shall think it desirable, be issued into another county; the plaintiff, in such case, describing the defendant therein, as *late* of the place of which he was described in the first writ of *summons*^l. The *forms* of these writs are given in the rule^m, and will be found in the *Appendix* to the *third Supplement*ⁿ; and they should be signed, and sealed, in like manner as the first writ^o.

Alias and pluries
writs of sum-
mons.

Memorandum
and indorse-
ments on.
May be issued
into another
county.

Forms of.

When the defendant cannot be met with, but keeps out of the way, to avoid being served with the writ of *summons*, *alias* or *pluries*, the plaintiff may apply to the court, or a judge, on a proper *affidavit*^p, for leave to issue a *distringas*, to compel his appearance. The plain-

Proceedings,
when defendant
cannot be per-
sonally served.

^a Foot v. Sheriff (or Shirreff), 2 Bing. N. R. 528. 2 Scott, 806. 1 Hodges, 412. S. C. and see Foot v. Collins, 11 Leg. Obs. 495, 6.

^b Foot v. Collins, 11 Leg. Obs. 495, 6.

^c Foot v. Shirreff, 2 Scott, 818.

^d Sched. to stat. 2 W. IV. c. 39. No. 1. Append. to Tidd Sup. 1833. pp. 264. 277.

^e Stat. 2 W. IV. c. 39. § 10.

^f Sched. to stat. 2 W. IV. c. 39. No. 1. Append. to Tidd Sup. 1833. p. 262, 3.

^g Ante, 66.

^h Append. to Tidd Sup. 1833. p. 263.

ⁱ Id. 264.

^k R. M. 3 W. IV. reg. 6. 4 Barn. & Ad. 3. 9 Bing. 444. 1 Crompt. & M. 3.

^l Append. to Tidd Sup. 1833. p. 264.

^m R. M. 3 W. IV. reg. 7. 4 Barn. & Ad. 3. 9 Bing. 445. 1 Crompt. & M. 3.

ⁿ Append. to Tidd Sup. 1833. p. 264.

^o Ante, 71.

^p Append. to Tidd Sup. 1833. p. 265. Brian v. Stretton, 1 Crompt. & M. 74. 3 Tyr. Rep. 163. 1 Dowl. Rep. 642. S. C. and see Atkins v. Lowther, 5 Leg. Obs. 144. Hill v. Mould, 3 Tyr. Rep. 162. n.

tiff, however, cannot move for a *distringas*, on this statute, until the expiration of *eight* days after a copy of the writ of *summons* has been left for the defendant, on the last attempt to serve him personally^a. And a *distringas* was refused, where a writ of *summons* had been issued more than *four* months, without being continued by an *alias* writ^b.

Writ of *distringas*, when it lies.

The writ of *distringas* is founded on the statute 2 W. IV. c. 39^c; by which it is enacted, that "in case it shall be made appear by *affidavit*, to the satisfaction of the court out of which the process issued, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any such writ of *summons* as therein before mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do, without some more efficacious process, then and in any such case, it shall be lawful for such court, or judge, to order a writ of *distringas* to be issued^d, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of *distringas* shall be in the form^e, and with the notice subscribed thereto^f, mentioned in the schedule to that act, marked No. 3."^g

Affidavit for obtaining.

In order to obtain a *distringas*, the *affidavit*^h (which is similar to that before required to ground a motion for a *distringas*, on the statutes 51 Geo. III. c. 124, § 2, and 7 & 8 Geo. IV. c. 71, § 5ⁱ.) must

^a Brian v. Stretton, 1 Crompt. & M. 74.
³ Tyr. Rep. 163. S. C. and see Atkins v. Lowther, 10 Q. B. 144. Hill v. Mould, 3 Tyr. Rep. 162. n.

^b Sewell v. Brown, 1 Hodges, 317.
Lemon v. Lemon, 2 Scott, 506.

^c § 3.

^d For the form of the rule of court in term time, and the order for drawing it up in vacation, see Append. to Tidd Sup. 1833. p. 267, 8.

^e Id. 268.

^f Id. 269.

^g Stat. 2 W. IV. c. 39. § 3. The proceedings by *distringas*, upon this statute, are in many respects similar to those which were before required by the statutes 51 Geo. III. c. 124. § 2, and 7 & 8 Geo. IV.

c. 71. § 3, in cases where the plaintiff proceeded by *original* or other writ, and *summons* or attachment thereupon, or by *subpoena* and attachment thereupon, in any action at law, against any person or persons not having privilege of parliament; as to which see Tidd Prac. 9 Ed. 113, 14, 155, 6.

^h Append. to Tidd Sup. 1833. p. 265.

ⁱ Johnson v. Rouse, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. S. C.; and for cases determined on the above statutes, see Tidd Prac. 9 Ed. 115, 156, and Scott v. Gould, 4 Taunt. 156. Turner v. Wall, 5 Taunt. 526. Down v. Crewe, 1 Marsh, 267. Anon. id. 268. a. Hannam v. Dietrichsen, 5 Taunt. 853. Watmore v. Bruce, 8 Taunt. 57. Anon. id. 171.

state that there have been *three* attempts at least to serve the defendant with the writ of *summons*, by calling at his dwelling-house, or place of abode^a, if he has one; service at the office of an employer, in such case, not being deemed sufficient^b; that on each of the *first* two calls, deponent apprised the person whom he saw, of the nature of his business^c, and made an appointment to call again, for seeing the defendant^d; and that on the *last* call, (which must appear to have been *eight* days at least before the application to the court^e;) a copy of the writ was left at the defendant's residence^f: The answers given to the deponent, on the different applications, must be stated in the *affidavit*^g; and he must not only swear that he has not been able to serve defendant with a copy of the writ, but must state

France v. Stephens, *id.* 693. 3 Moore, 23. S. C. 11 Moore, 371, 2. (a.) *Turner v. Smith*, 1 Moore & P. 557. in the Common Pleas; and *Pitt v. Eldred*, 1 Crompt. & J. 147. 1 Tyr. Rep. 128. S. C. *Winstanley v. Edge*, 1 Crompt. & J. 381. 1 Tyr. Rep. 276. S. C. *Godkin v. Redgate*, 1 Crompt. & J. 401. 1 Tyr. Rep. 287. S. C. *Whitehorne v. Simone*, 1 Crompt. & J. 402. 1 Tyr. Rep. 293. S. C. *Dobell v. King*, 1 Tyr. Rep. 496. *Anon. id.* 498, 9. *Giles v. Burroughs*, 1 Price, N. R. 75. *Bowser v. Austen*, 2 Crompt. & J. 45. 2 Tyr. Rep. 164. *Anon.* 1 Price, N. R. 139. S. C. *Fisher v. Goodwin*, *id.* 167. 2 Crompt. & J. 94. 2 Tyr. Rep. 164. S. C. *Bennington v. Owen*, 2 Crompt. & J. 125. *Hoblyn v. Simpson*, 2 Tyr. Rep. 165. *Latchman v. Cross*, *id. ib.* *Anon. id. ib.* Man. Ex. Append. 15. and *Dax*, Append. 74, 5, in the Exchequer of Pleas.

^a *Anon.* 1 Dowl. Rep. 513. 5 Leg. Obs. 63. S. C. K. B. *Thomas v. Thomas*, 2 Moore & S. 730. C. P. *Johnson v. Rouse*, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. 1 Dowl. Rep. 641. S. C. *Pagden v. Kelly*, 1 Leg. Ex. N. S. 205. Excheq. *per Bayley*, B.

^b *Thomas v. Thomas*, 2 Moore & S. 730.

^c *Coett v. Willis*, 5 Leg. Obs. 144. K. B. *Johnson v. Rouse*, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. 1 Dowl. Rep.

641. S. C. Excheq.

^d *Johnson v. Rouse*, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. 1 Dowl. Rep. 641. S. C. *Atkins v. Lowther*, 5 Leg. Obs. 144. Excheq.; and see *Simpson v. Lord Graves*, 2 Dowl. Rep. 10. 6 Leg. Obs. 45. S. C. Excheq. *Wills v. Bowman*, 2 Dowl. Rep. 413. *Anon.* 7 Leg. Obs. 108. S. C. *per Littledale*, J.

^e *Smith v. James*, 5 Leg. Obs. 143. K. B. *Brian v. Stretton*, 1 Crompt. & M. 74. 3 Tyr. Rep. 163. 1 Dowl. Rep. 642. S. C. *Atkins v. Lowther*, 5 Leg. Obs. 144. Excheq.

^f *Anon.* 1 Dowl. Rep. 513. 5 Leg. Obs. 63. S. C. *Coett v. Willis*, 5 Leg. Obs. 144. K. B. *Street v. Ld. Alvanley*, 1 Crompt. & M. 27. 3 Tyr. Rep. 162. 1 Dowl. Rep. 638. S. C. *Hill v. Mould (or Maule)*, 3 Tyr. Rep. 162. (a.) 1 Crompt. & M. 617. 2 Dowl. Rep. 10. 6 Leg. Obs. 45. S. C. *Jones v. Green*, E. 3 W. IV. Excheq. *Crickett v. Brill*, 6 Leg. Obs. 477. *per Taunton*, J. *Smith v. Good*, 2 Dowl. Rep. 396. 7 Leg. Obs. 156. S. C. *per Littledale*, J. *Mason v. Lee*, 5 Nev. & M. 240. *Anon.* 1 Har. & W. 380. 5 Nev. & M. 240. S. C. *Hooker v. Tooke*, 1 Hodges, 315.

^g *Pagden v. Kelly*, 1 Leg. Ex. N. S. 205. Excheq. *per Bayley*, B. and see *Waddington v. Palmer*, 2 Dowl. Rep. 7. 6 Leg. Obs. 444. S. C. Excheq.

Irregularity in form of affidavit, no ground for setting aside *distringas*.

Distringas to compel appearance, or proceed to outlawry.

in his *affidavit* such circumstances as will satisfy the court, or a judge, that the defendant keeps out of the way, to avoid being served^a. It must also be positively sworn, that the defendant has not appeared to the action, according to the exigency of the writ; and cannot be compelled to do so, without some more efficacious process^b. If it can be inferred, however, from the *affidavit*, that the defendant purposely kept out of the way, to avoid being served with the writ of *summons*, the court will grant a *distringas*, although the person who made the calls omitted to specify the day and hour on which he would call again^c: And the last two calls may, it seems, under circumstances, be made on the same day^d. It also seems, that though the court will not in general grant a *distringas*, except on an *affidavit* that a copy of the writ has been left at defendant's house, still the mere want of that averment in the *affidavit*, is not sufficient to enable the defendant to move to set aside the *distringas*, as being irregular^e: and they refused to set aside a *distringas* for irregularity, because, in the copy of the writ of *summons* which was left, the name of *Andrew Bryan* was put as the defendant's name, instead of *Andrews Bryan*^f.

By the uniformity of process act^g, a *distringas* may be issued either to compel an appearance, or for the purpose of proceeding to outlawry^h: And a *distringas* will be granted, for enabling a plaintiff to proceed to *outlawry*, in some cases, where the *affidavits* are not sufficient to ground a *distringas*, for entering an *appearance*ⁱ. But the court will not grant a *distringas*, in the alternative^k: and where it was not clear, on the face of the *affidavit*, whether the defendant was in

^a Anon. 1 Dowl. Rep. 513. 5 Leg. Obs. 63. S. C. Johnson v. Rouse, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. 1 Dowl. Rep. 641. S. C. Simpson v. Ld. Graves, 2 Dowl. Rep. 10. 6 Leg. Obs. 45. S. C. Waddington v. Palmer, 2 Dowl. Rep. 7. Price v. Bower, *id.* 1. 6 Leg. Obs. 445. S. C. Smith v. Hill, 2 Dowl. Rep. 225. 7 Leg. Obs. 509. S. C. Houghton v. Howarth, 4 Dowl. Rep. 749. 12 Leg. Obs. 158. S. C. and see 9 Leg. Obs. 197, 8, 9.

^b Stat. 2 W. IV. c. 39. § 3. Hocker v. Townsend, 1 Hodges, 204.

^c Johnson v. Disney, 2 Dowl. Rep. 400. Anon. 7 Leg. Obs. 108. S. C. *per Littledale*, J. and see Hickman v. Dallimore, 1 Har. & W. 524. 4 Dowl. Rep. 278. 11 Leg. Obs. 100. S. C. Godfrey v. Green,

id. 102.

^d White v. Western, 2 Dowl. Rep. 451. 7 Leg. Obs. 301. S. C. *per Parke*, J. but see Cross v. Wilkins, 4 Dowl. Rep. 279. 1 Har. & W. 516. 11 Leg. Obs. 102. S. C.

^e Smith v. Macdonald, 1 Dowl. Rep. 688.

^f Tyser v. Bryan, 2 Dowl. Rep. 640. Pybus v. Bryant, 4 Tyr. Rep. 994. S. C.

^g 2 W. IV. c. 39. § 3.

^h Fraser v. Case, 9 Bing. 464. 2 Moore & S. 720. 1 Dowl. Rep. 725. S. C.

ⁱ Hewitt v. Melton, 1 Crompt. & M. 720. 3 Tyr. Rep. 822. S. C. Phillips v. Bowen, *id.* 822. (a). Jones v. Price, 2 Dowl. Rep. 42.

^k Fraser v. Case, 9 Bing. 464. 2 Moore & S. 720. 1 Dowl. Rep. 725. S. C.

this country or abroad, the court put the plaintiff to make his election, as to the purpose for which he sought to obtain the *distringas* ^a. When there is reason to believe that the defendant is abroad, a *distringas* to compel an appearance, it is said, will not be allowed ^b: And, in order to proceed to outlawry, the *affidavit* must state, not only that the defendant went abroad, for the purpose of avoiding the demands of his creditors, but also satisfy the court, or a judge, by a statement of the circumstances, that he keeps out of the way, to avoid being served ^b: When the defendant is not abroad, a *distringas*, for the purpose of outlawry, will not, it seems, be granted ^c: And when his residence is unknown, endeavours must be made to serve him personally, before the *distringas* can be obtained ^d; and grounds must be stated in the *affidavit*, to induce the court to believe that he keeps out of the way to avoid being served ^d.

When defendant is abroad.

When his residence is unknown.

If the court, or a judge, are satisfied by *affidavit*, that the defendant has not appeared to the action, and cannot be compelled to do so without some more efficacious process, they will make a rule ^e, or order ^f, for issuing the *distringas*, which is absolute in the first instance; and drawn up by the clerk of the rules in the King's Bench and Exchequer, or secondaries in the Common Pleas. But if the *affidavit* be insufficient, the plaintiff may sue out an *alias* or *pluries* writ of *summons*, for continuing the cause; which is sometimes done, when the first writ has not been personally served, to prevent the operation of the statute of limitations.

Rule or order for *distringas*.

The writ of *distringas* is issued on a proper *præcipe* ^g; and is a *non omittas* writ, commanding the sheriff, or other officer or person to whom it is directed, that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels of the defendant, for the sum of *forty* shillings, in order to compel his appearance in the court in which the action is brought, to answer the plaintiff, in a plea of trespass on the case, (or debt, &c., as the case may be,) and to make known to the court, how he shall execute the same, on the return day ^h.

Form of *distringas*.

^a *Fraser v. Case*, 9 Bing. 464. 2 Moore & S. 720. 1 Dowl. Rep. 725. S. C.

& S. 720. 1 Dowl. Rep. 725. S. C.

^d 1 Dowl. Rep. 555.

^b *Simpson v. Ld. Graves*, 2 Dowl. Rep. 10. and see *Moon v. Thynne*, 3 Dowl. Rep. 153. 9 Leg. Obs. 77. S. C. per *Gurney*, B. *Evans v. Fry*, 3 Dowl. Rep. 581. 1 Har. & W. 185. 10 Leg. Obs. 76. S. C. *White v. Johnson*, 1 Gale, 108.

^e *Append. to Tidd Sup.* 1833, p. 267.

^f *Id.* 268.

^g *Sched. to stat. 2 W. IV. c. 39. No. 3. Append. to Tidd Sup.* 1833, p. 268. For the writ of *distringas*, and proceedings thereon, before stat. 2 W. IV, c. 39, on a special original writ, in the King's Bench

^c *Fraser v. Case*, 9 Bing. 464. 2 Moore

To whom directed.

This writ should, in general, be directed to the sheriff of the county wherein the dwelling-house or place of abode of the defendant is situate, or to the sheriff of any other county, or to any other officer to be named by the court, or a judge^a: If there are more sheriffs than one, the writ of *distringas* should be directed accordingly^b; and if it be to a sheriff, or sheriffs, of a city or town and county of itself, it should be so described^c; or, if one of the sheriffs is a party, the writ should be directed to the other^d; or, if both the sheriffs are parties, to the *coroner*^e; and, if he also be a party, to *elisors* named by the *master* in the King's Bench^f, or *prothonotaries* in the Common Pleas^g, or by a master and prothonotary in the Exchequer. When any district or place, being parcel of one county, is wholly situate within and surrounded by another, the writ of *distringas* may be directed to the sheriff of either county, to serve or execute the same within such district^h.

In county palatine.

The authority and jurisdiction of the Chamberlain, and Vice-chamberlain of the county palatine of *Chester*, being abolished by the statute 11 Geo. IV. & 1 W. IV. c. 70. § 13ⁱ, the process of *distringas* and *capias*, &c. should be directed to the sheriff of that county. But there is a *proviso* in the statute 2 W. IV. c. 39^k, that "nothing therein contained shall abridge, alter, or affect the franchises and jurisdictions of either of the counties palatine of *Lancaster* or *Durham*, or of any officer or minister thereof." If the defendant, therefore, reside in the county palatine of *Lancaster*, the

or Common Pleas, see Tidd *Prac.* 9 Ed. 110, 11; on a *capias quare clausum fre-git*, in the Common Pleas, *id.* 111; on a *venire facias*, and *subpoena*, in the Exchequer, *id.* 155, 6; on stat. 7 & 8 Geo. IV. c. 71. § 5, *id.* 113, 14. 155, 6; and respecting *issues*, on writs of *distringas*, *id.* 110, 11. 119. 155.

^a Stat. 2 W. IV. c. 39. § 3. and see Sched. thereto, No. 3. Append. to Tidd *Sup.* 1833, p. 261. Wright v. Warren, 3 Moore & S. 164. 2 Dowl. Rep. 724. S. C. per Alderson, J. *Ante*, 66. 73.

^b Stat. 2 W. IV. c. 39. § 3.

^c Append. to Tidd *Sup.* 1833, p. 269.

^d Letsom v. Bickley, 5 Maule & S. 144.

^e Weston v. Coulson, 1 Blac. Rep.

506. — v. Phillips, E. 42 Geo. III. K. B. Append. to Tidd *Sup.* 1833, p. 269.

^f Grant v. Bagge, 3 East, 141. Append. to Tidd *Sup.* 1833, p. 262.

^g Andrews v. Sharp, 2 Blac. Rep. 911. Mayor, &c. of Norwich v. Gill, 1 Moore & S. 91. 8 Bing. 27. S. C.; but see Mayor, &c. of Berwick upon Tweed v. Williams, 10 Moore 266. and see Tidd *Prac.* 9 Ed. 151. Append. thereto, Chap. XIII. § 42, and to Tidd *Sup.* 1833, p. 269.

^h For a direction to the sheriff of either county to execute a writ of *capias* in a particular district, see Append. to Tidd *Sup.* 1833, p. 272. n.

ⁱ Tidd *Sup.* 1830, pp. 24, 5.

^k § 21.

writ should be directed to the *Chancellor*, or his deputy^a; commanding him, that by writ under the seal of his county palatine to be duly made, and directed to the sheriff of the said county palatine, he command the said sheriff, that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels, &c., (*as before*;) and how the said sheriff shall execute that writ, he make known, &c. on the return day^b. In the county palatine of *Durham*, the writ of *distringas* was formerly directed to the *Bishop*, or his chancellor; commanding him, that by writ under the seal of his bishopric to be duly made, and directed to the sheriff of the county of *Durham*, he should cause the said sheriff to be commanded, that he omit not, &c. (*as above*.) But, by a late act of parliament, which has been noticed in the *second* Chapter^c, the palatine jurisdiction of the *Bishop* of *Durham* being separated from the bishopric, and vested in the Crown, the writ of *distringas* is now in the common form; and may be directed to, and executed by the sheriff of the county of *Durham*, when the defendant resides in that county. In the *cinque ports*, the process is directed to the *Constable* of *Dover* castle, his deputy or lieutenant^d; and, in *Berwick upon Tweed*, to the mayor and bailiffs of *Berwick*^e. In the *Isle of Ely*, the process out of the courts at *Westminster* goes in the first instance to the sheriff of *Cambridgeshire*, who thereupon issues his mandate to the bailiff of the franchise^f: And, in like manner, when the defendant resides in the borough of *Southwark*, the process is directed to the sheriff of the county of *Surrey*, who issues his mandate thereupon to the bailiff of the borough, and not to the bailiff in the first instance^g. The sheriff of the *city* of *Oxford*, appointed in pursuance of the municipal corporation act^h, has not the execution in *Oxford*, of writs from the superior courts; but they are still to be executed by the sheriff of the *county*ⁱ. In every writ of *distringas*, issued under the authority of the uniformity of process act, it is a rule^k, that "a *non omittas* clause

In cinque ports.

Berwick upon
Tweed.
Isle of Ely.

Southwark.

Oxford.

No additional
fee for non
omittas clause
in *distringas*.

^a R. M. 3 W. IV. reg. 16. 4 Barn. & Ad. 5, 6. 9 Bing. 450, 51. 1 Crompt. & M. 7, 8. and see Tidd *Prac.* 9 Ed. 151. Append. thereto, Chap. VIII. § 26.

^b Append. to Tidd *Sup.* 1833, p. 268. R. M. 3 W. IV. reg. 16. 4 Barn. & Ad. 5, 6. 9 Bing. 450, 51. 1 Crompt. & M. 7, 8.

^c Stat. 6 & 7 W. IV. c. 19. *Ante*, 33, 4. Append. to Tidd *Sup.* 1833, p. 269.

^d *Id. ib.*

^e Grant v. Bagge, 3 East, 128.

^f Bowring v. Pritchard, 14 East, 289. and see 1 Chit. R. 374. (*b.*) Tidd *Prac.* 9 Ed. 152.

^g 5 & 6 W. IV. c. 76. § 61.

^h Granger v. Taunton, 2 Bing. N. R. 64. 5 Dowl. Rep. 190. S. C.

ⁱ R. M. 3 W. IV. reg. 8. 4 Barn. & Ad. 3. 9 Bing. 445. 1 Crompt. & M. 4.

may be introduced by the plaintiff, without the payment of any additional fee on that account."

Teste of distringas.

When returnable.

For proceeding to outlawry.

Notice to be subscribed to.

Indorsements on.

Issuing, signing, and sealing.

The writ of *distringas* must be *tested* in the name of the chief justice of the King's Bench or Common Pleas, or chief baron of the Exchequer; or, in case of a vacancy of such office, then in the name of a *senior puisne* judge of the court from which it issues^a: And "every such writ shall be made returnable on some day in term, not "being less than *fifteen* days after the *teste* thereof; and shall bear "teste on the day of the issuing thereof, whether in term or in vacation."^b But "no such writ shall be sufficient for the purpose of "outlawry, or waiver, if the same be returned within less than *fifteen* "days after the delivery thereof to the sheriff, or other officer to "whom the same shall be directed."^c

A notice is required to be subscribed to the writ of *distringas*^d, which is addressed to the defendant, requiring him to take notice, that the sheriff has distrained upon his goods and chattels for the sum of *forty* shillings, in consequence of his not having appeared in court, to answer to the plaintiff, according to the exigency of the writ of *summons*; and that in default of his appearance to the writ of *distringas*, within *eight* days *inclusive* after the return thereof, the plaintiff will cause an appearance to be entered for him, and proceed thereon to judgment and execution^e; or, (*if the defendant be subject to outlawry*,) will cause proceedings to be taken to outlaw him^f. And the writ of *distringas* is to be indorsed with the name of the plaintiff, or his attorney, in like manner as the writ of *summons*^g; and the amount of the debt and costs claimed by the plaintiff, when the action is brought for the recovery of a *debt*, should, it seems, be indorsed thereon^h. This writ is issued on a proper *præcipe*ⁱ, and signed, and sealed, in like manner as the writ of *summons*.

^a Stat. 2 W. IV. c. 39. § 12.

^b Stat. 2 W. IV. c. 39. § 3. And for the manner in which the writ of *distringas* was made returnable, before the statute 2 W. IV. c. 39, on an *original* writ of trespass *quare clausum fregit* in the Common Pleas, see Tidd *Prac.* 9 Ed. 111.

^c Stat. 2 W. IV. c. 39. § 5.

^d Sched. to Stat. 2 W. IV. c. 39, No. 3. Append. to Tidd *Sup.* 1833, p. 269.

^e This notice is, so far, similar to that which was before required by the statutes

51 Geo. III. c. 124. § 2. and 7 & 8 Geo. IV. c. 71. § 5. And for what is deemed a sufficient execution of a writ of *distringas*, to entitle the plaintiff to enter an appearance for the defendant, see *Jones v. Dyer*, 2 Dowl. Rep. 445. 3 *Leg. Obs.* 205. S. C. *per Parke, J.*

^f Sched. to stat. 2 W. IV. c. 39. No. 3. Append. to Tidd *Sup.* 1833, p. 269.

^g *Post*, 97, 8.

^h *Ante*, 72.

CHAP. VI.

Of the PROCESS against PEERS of the REALM, and MEMBERS of the HOUSE of COMMONS; and against CORPORATIONS, and HUNDREDORS.

AT common law, *peers* of the realm, and members of the House of Commons, not being subject to a *capias*, could only have been sued by *original writ*^a; which was also formerly the only mode of commencing actions against *corporations*, and *hundredors* on the statutes of hue and cry, &c.: but members of the House of Commons might have been sued, either by *original writ*, or by *bill* and *summons*, &c. on the statute 12 & 13 W. III. c. 3. § 2^b. The mode of commencing actions, however, by *original writ* against peers, and by *original writ* or *bill*, against members of the House of Commons, being, as we have seen^c, abolished by the uniformity of process act, they must now in general be sued, like other persons, by writ of *summons* and *distringas*. If the defendant be a peer, he should be described in the process by his name of dignity, as "the Right Honourable C. D. Duke, Marquis, or Earl of —," (&c.); and it is usual, in an action against a peer, or member of the House of Commons, to describe the former as having privilege of *peerage*; and the latter, as having privilege of *parliament*; but this latter description does not seem to be necessary^d.

In all *personal* actions, wherein it shall be intended to proceed against a member of parliament, according to the provisions of the statute made in the *sixth* year of the reign of his late Majesty king George the Fourth^e, intituled, 'An act to amend the laws relating to

Peers and members of parliament how formerly sued.

Must now be sued by writ of summons and *distringas*.

How described in process.

Writ of summons against members of parliament, to enforce provisions of stat. 6 Geo. IV. c. 16. § 10.

^a Tidd *Prac.* 9 Ed. 116.

^b *Dawkins (or Dawson) v. Burridge*, 2 Ld. Raym. 1442. 2 Str. 734. S. C. but this mode of proceeding was not allowed as against unprivileged persons. *Whitworth v. Richardson*, E. 23 Geo. III. K. B.

^c *Ante*, 59.

^d *Cantwell v. Earl of Stirling*, 1 Moore & S. 297. 8 Bing. 174. S. C. *Ante*, 67.

^e 6 Geo. IV. c. 16. § 10. And for the proceedings on this statute, against traders having privilege of parliament, see Tidd *Prac.* 9 Ed. 116, 17.

Bankrupts,^a the process is required, by the uniformity of process act^a, to be according to the form contained in the schedule to that act, marked No. 6^b; and which process, and a copy thereof, is declared to be in lieu of the *summons*, or original *bill* and *summons*, and a copy thereof, mentioned in the statute 6 Geo. IV. c. 16. § 10.

Direction, and form of writ.

This process is issued, on a proper *præcipe*^c, and directed to the defendant, (*stating his residence, or place of abode*;) commanding him, that within *one* calendar month next after personal service thereof on him, he do cause an appearance to be entered for him, in the court in which he is sued, in an action on promises, (*or debt, &c., as the case may be*,) at the suit of the plaintiff; and the defendant is thereby informed, that an *affidavit* of debt for the sum of —*l.* hath been filed in the proper office, according to the provisions of the said statute of 6 Geo. IV.; and that unless he pay, secure, or compound for, the debt sought to be recovered in that action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for him, within *one* calendar month next after such service thereof, he will be deemed to have committed an act of bankruptcy, from the time of the service thereof^d. This *summons* is required to be in-

Indorsements on.

dorsed with the name of the plaintiff, or his attorney, in like manner as the writ of *capias*^e; and the amount of the debt and costs claimed by the plaintiff, when the action is brought for the recovery of a *debt*^e, should it seems be indorsed thereon. The writ of *summons*

Signing, sealing, and service of.

against a member of parliament, should be signed and sealed, and personally served on the defendant, in like manner as the ordinary writ of *summons*^f. And where, in proceeding against a member of parliament, it appeared that the action was brought in 1823, against the defendant, who was then a member, but had since ceased to be so; the action was commenced by *bill*, and writ of *summons* thereon, and the writ was returned *non est inventus*, and entered of record, but no further steps had afterwards been taken, as the defendant had been out of the country; and the plaintiff being desirous of continuing the proceedings, in order to save the statute of limitations, the court held, that a writ of *distringas* ought to issue, and would be the proper continuance of the suit^g.

Continuance of process against member of parliament.

^a 2 W. IV. c. 39. § 9.

^b Append. to Tidd *Sup.* 1833, p. 263, 4.

^c *Id.* p. 263.

^d Sched. to stat. 2 W. IV. c. 39. No.

^e Append. to Tidd *Sup.* 1833. pp. 263, 4.

^f *Id.* *ib.*

^g *Ante*, 71.

^h Taylor v. Duncombe, 2 Dowl. Rep. 401. 8 Leg. Obs. 137, 8. S. C. per Little-
dale, J. and see Dickenson v. Teague
1 Crompt. M. & R. 241. 4 Tyr. Rep.
450. S. C. per Parke, B.

The mode of commencing actions against *corporations*, and *hundredors*, by *original writ*, being abolished by the uniformity of process act ^a, they must now be sued, like other persons, by writ of *summons* and *distringas*; and, in actions against *corporations* aggregate, they must be described in the process by their *corporate name* ^b; as, in *London*, "the Mayor, commonalty and citizens of the city of *London*:" and, when *hundredors* are sued on the statute 7 & 8 Geo. IV. c. 31, they must be described, as "men inhabiting within the hundred of —, in the county of —." ^c But where a plaintiff, by mistake, had proceeded against the inhabitants of the *hundred*, instead of the *borough* of *S.* in an action for damage done by rioters, under the above statute, the court amended the writ and subsequent proceedings, by striking out the word "*hundred*," and substituting the word "*borough*," the time for bringing a fresh action having expired ^d. When the writ of *summons* is issued against a *corporation* aggregate, it may be served on the mayor, or other head officer, or on the town clerk, clerk, treasurer, or secretary, of such corporation ^e; and every such writ, issued against the inhabitants of a *hundred*, or other like district, may be served on the high constable thereof, or any one of the high constables thereof^e: And every such writ, issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town or place, not being part of a hundred, or other like district, on some peace officer thereof^e.

Corporations and hundredors, &c. how sued.

How described in process.

Service of process on.

^a 2 W. IV. c. 39.

^b 2 Inst. 666. Com. Dig. tit. *Pleader*, 2 B. 1. *Ante*, 67.

^c Append. to Tidd *Prac.* 9 Ed. 36. *Ante*, 67.

^d *Horton v. Inhabitants of Stamford*, 1 Cramp. & M. 773. 3 Tyr. Rep. 869. 2 Dowl. Rep. 96. S. C.

^e 2 W. IV. c. 39. § 13. For the manner of serving process before the above statute, in actions against *corporations*, see Tidd *Prac.* 9 Ed. 121.; against *hundredors*, on stat. 7 & 8 Geo. IV. c. 31. § 4. *id.* 123.; and against inhabitants of the county of a city or liberty, &c. *id.* 126.

CHAP. VII.

Of the WRIT of CAPIAS, and PROCESS of OUTLAWRY.

Writ of *capias*,
in what actions
it lies.

Direction, and
form of.

Notice to de-
fendant.

When to be
returned.

THE writ of *capias*, now used for the commencement of bailable actions, is founded on the statute 2 W. IV. c. 39. by which it is enacted, that "in all *personal* actions, wherein it is intended to arrest "and hold any person to special bail, who may not be in the custody "of the marshal of the marshalsea of the court of King's Bench, or "of the warden of the *Fleet* prison, the process shall be by writ of "*capias*, according to the form contained in the schedule annexed to "that act, and marked No. 4." ^a This writ (which lies in all cases where the plaintiff has a bailable cause of action, and against all persons who are not exempted or privileged from arrest ^b), is a *non omittas* writ, directed to the sheriff, or other officer or person by whom the same is to be executed, in like manner as the writ of *distringas* ^c; commanding him, that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take the defendant, (stating his place of residence,) if he shall be found in his bailiwick, and him safely keep, until he shall have given the said sheriff, &c. bail ^d, or made deposit with him ^d, according to law, in an action on promises, (or, of debt, &c.) at the suit of the plaintiff, or until the defendant shall by other lawful means be discharged from his custody; and that, on execution thereof, the said sheriff, &c. do deliver a copy thereof to the defendant ^e: and requiring the defendant to take notice, that within eight days after the execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him, in the court where the action is brought, to the said action ^e; and that in default of his so doing, such proceedings may be had and taken, as are mentioned in the warning thereunder written, or indorsed thereon ^e: And further commanding the said sheriff, &c. that immediately after the execution thereof, he do return the writ to the said court, together with the manner in which he shall have executed the same, and the day of the

^a Stat. 2 W. IV. c. 39. § 4. Append.
to Tidd *Sup.* 1833, p. 272.

^b For the persons who are so privileged
or exempted, *vide post*, 114, 15.

^c *Ante*, 78.

^d *Vide post*, Chap. XI.

^e Sched. to stat. 2 W. IV. c. 39. No.
4. Append. to Tidd *Sup.* 1833. p. 272, &c.

execution thereof; or that, if the same shall remain unexecuted, then that he do so return the same, at the expiration of *four* calendar months from the date thereof, or sooner, if he should be thereto required, by order of the said court, or by any judge thereof^a. As this writ does not command the sheriff, or other officer to whom it is directed, to take and keep the defendant, to *answer* the plaintiff, &c. it cannot, with propriety, be called, as formerly, a *capias ad respondendum*: but as it commands the sheriff, &c. to take and keep the defendant, *until* he shall have given bail, &c. it may not improperly be called a *capias quousque*, to distinguish it from the *capias ad satisfaciendum*.

The form of the writ, as prescribed by the act, must be strictly adhered to: Therefore, where a writ of *capias* was directed to the sheriffs, instead of the sheriff of *Middlesex*, it was holden to be irregular^b; but if a writ of *capias* be regularly directed to the sheriffs, the subsequent introduction of the word "sheriff" will not render it invalid^c. If the warning required to be given to the defendant be written on the *back* of the *capias*, the words "indorsed hereon," must be inserted in the body of the writ^d; but if the warning be placed at the *foot* of the writ, it is only necessary, in the body of it, to introduce the words "hereunder written."^e

Form of writ
to be strictly
adhered to.

The writ of *capias*, as well as the *distringas*, into the county palatine of *Lancaster* is required, by a general rule of all the courts^f, to be directed to the Chancellor of the county palatine of *Lancaster*, or his deputy; and commands him, that by his writ, under the seal of the said county palatine to be duly made, and directed to the sheriff of the said county palatine, he command the said sheriff, that he omit not, by reason of any liberty in his bailiwick, but that he enter the same, and take the defendant, &c. (*as in common cases*): And that he further command him, that, on execution thereof, he do deliver a copy thereof to the said defendant; and that the said writ do require the said defendant to take notice, &c.; and that he further command the said sheriff, that immediately after the execution thereof, he do return that writ, &c.^g (*as in the ordinary capias, with the like memorandum, warning, and indorsements.*) In the county palatine of *Durham*, the

Writ of *capias*
to county pala-
tine.

^a Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Tidd *Sup.* 1833, p. 272, 3. And for decisions on the writ of *capias*, see 9 Leg. Obs. 211.

^b *Barker v. Weedon*, 1 Crompt. M. & R. 396. 4 Tyr. Rep. 860. 2 Dowl. Rep. 707. S. C. *Jackson v. Jackson*, 1 Crompt. M. & R. 438. 5 Tyr. Rep. 136. 3 Dowl. Rep. 162. S. C.

^c *Irving v. Heaton*, 2 Scott, 796. 4 Dowl. Rep. 638. 1 Hodges, 430. S. C.

^d *Barker v. Weedon*, 2 Dowl. Rep. 706.

^e *Bridgman v. Curgenvin*, 3 Dowl. Rep. 1. 9 Leg. Obs. 45. S. C. *per Littleale, J.*

^f R. M. 3 W. IV. reg. 16. 4 Barn. & Ad. 5, 6. 9 Bing. 450, 51. *Anle*, 70.

^g Append. to Tidd *Sup.* 1833, p. 273.

writ of *capias*, though formerly directed to the *Bishop* or his Chancellor, is now, in consequence of the statute 6 & 7 W. IV. c. 19, in the common form; and may be directed to, and executed by the *sheriff* of the county of *Durham*.

Defendant's names should be inserted in writ.

Initials of his christian name, when and how stated.

By R. H. 2 W. IV. reg. I. § 32.

By stat. 3 & 4 W. IV. c. 42.

The christian and surnames of the defendant, if known, should be inserted in the writ: the surname only of the defendant being set out therein, is insufficient^a. And where he was described in the process, and *affidavit* to hold to bail, by the *initials* of his christian name only, the courts would formerly have ordered the bail bond to be delivered up to be cancelled, and the defendant discharged, upon entering a common appearance^b. But where a defendant named "*Cocken*," was sued by the name of "*Cocker*," and arrested on a writ in that name, and gave a bail bond in his right name, which bail bond was afterwards assigned, the declaration on it was holden to be good, without an averment that the defendant was known by one name as well as the other^c. And, by a general rule of all the courts^d, "where the defendant is described in the process, or *affidavit* to hold to bail, by *initials*, or by a wrong name, or without a *christian* name, the defendant shall not be discharged out of custody, or the bail bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the court, that due diligence has been used to obtain knowledge of the proper name." In the construction of this rule, due diligence was holden to have been used, in inquiring the name of a defendant, although no inquiries had been made of him, or his immediate friends, or at his house, or place of business; the debt being large, and the *affidavits* shewing that there was ground to fear he might abscond, if he knew that proceedings were about to be instituted^e; and inquiry of a partner of the defendant, who gave the wrong christian name, and at a banker's, where no information was obtained, was deemed sufficient diligence^f: but where due diligence has not been used, a defendant may be discharged out of custody on that ground; or on account of his christian name not being stated in the *affidavit*^g. And now, by the late act for the further amendment

^a *Margetson v. Tugge*, 5 Dowl. Rep. 9. 12 Leg. Obs. 228, 9 S. C.

^b *Reynolds v. Hankin*, 4 Barn. & Ald. 536. and see *Parker v. Bent*, 2 Dowl. & R. 73. *M'Beath v. Chatterley*, *id.* 237. *K. B. Taylor v. Rutherman*, 6 Moore, 264. C. P.

^c *Finch v. Cocken*, 3 Dowl. Rep. 678. 1 Gale, 130. 2 Crompt. M. & R. 196. 5 Tyr. Rep. 774. S. C.

^d R. H. 2 W. IV. reg. I. § 32. 3 Barn. & Ad. 378. 8 Bing. 292. 2 Crompt. & J. 176, 7.

^e *Hicks v. Mareco*, 1 Crompt. & M. 84. 3 Tyr. Rep. 216. S. C.

^f *Ladbrook v. Phillips*, 1 Har. & W. 109. and see *Rosset v. Hartley*, 5 Nev. & M. 415. 1 Har. & W. 581. S. C.

^g *Anon.* 5 Leg. Obs. 94, 5. *per Littleale*, J.

of the law^a, &c. "in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the *initial* letter or letters, or some contraction of the christian or first name or names, it shall be sufficient, in every *affidavit* to hold to bail, and in the process or declaration, to designate such person by the same *initial* letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full."

The writ of *capias*, and copy thereof, and writs which purport to be a continuance of the *capias*, must state the place where the defendant resides; and if that be unknown, the place where he is supposed to reside^b. And the actual or supposed place of his residence must be stated in that part of the body of the writ prescribed by the schedule to the statute 2 W. IV. c. 39, No. 4^c: Therefore, where the defendant was described as "*T. S. a clerk in the army pay office, Somerset House, in the city of Westminster, and county of Middlesex,*" this was holden not to be a sufficient description of his residence, in a *capias*^d. If the defendant's place of residence be not inserted in the writ of *capias*, it may be set aside, at the instance of the defendant, though his residence be stated in the copy of the writ^e; and it is not sufficient to indorse it on the writ, or copy thereof^f. But it is not necessary to give a particular description of the defendant's place of residence in the process^g: a place at which he may be expected to be found is sufficient^h; and it does not appear that the same degree of particularity is required in the writ of *capias*, as in the writ of *summons*ⁱ: Therefore, a description of the defendant in the *capias*, as of *Kent street, in the county of Surrey*, without the number of the house, or pariah where situate, has been deemed sufficient^j. So, he may be de-

Defendant's residence, or place of abode.

^a 3 & 4 W. IV. c. 42. § 12.

^b *Roberts v. Wedderburne*, 1 Bing. N. R. 4. *Ante*, 66, 84. and see *Hill v. Harvey*, 4 Dowl. Rep. 163. 1 Gale, 185. 2 Crompt. M. & R. 307. 10 Leg. Obs. 509, 10. S. C. *Rolfe v. Swann*, 1 Meeson & W. 305. 1 Tyr. & G. 665. 5 Dowl. Rep. 106. S. C. *Ward v. Watt*, *Id.* 94.

^c *Lindredge v. Roe*, 1 Bing. N. R. 6.

^d *Rolfe v. Swann*, (or *Swain*), 1 Meeson & W. 305. 1 Tyr. & G. 665. 5 Dowl. Rep. 106. 12 Leg. Obs. 213. S. C.

^e *Rice (or Price) v. Huxley*, 2 Dowl. Rep. 231. 2 Crompt. & M. 211. 4 Tyr.

Rep. 68. 7 Leg. Obs. 317. S. C.

^f *Lindredge v. Roe*, 1 Bing. N. R. 6.

^g *Welsh v. Langford*, 2 Dowl. Rep. 498. 8 Leg. Obs. 330. S. C. *Buffle v. Jackson*, 2 Dowl. Rep. 505. 8 Leg. Obs. 380. S. C. *per Taunton, J.* and see *Jelks v. Fry*, 3 Dowl. Rep. 37. *French v. Gregson*, 9 Leg. Obs. 138, 9. S. C. *per Littledale, J.*

^h *Buffle v. Jackson*, 2 Dowl. Rep. 505. 8 Leg. Obs. 380. S. C. *per Taunton, J.*

ⁱ *Webb v. Lawrence*, 2 Dowl. Rep. 81. 1 Crompt. M. & R. 806. 3 Tyr. Rep. 906. 6 Leg. Obs. 461. S. C.

scribed as of his *late* place of residence ^a; or, if a prisoner, as of the *gaol* in which he is in custody ^b: and a variance between the description of the defendant's residence in the *affidavit* of debt and the *capias*, is immaterial ^c. It is an unsettled point, whether it is necessary to state in the *capias*, the county in which a defendant is supposed to reside ^d.

Nature of
action.

In describing the *nature* of the action, the forms in the schedule to the statute must be strictly observed. These forms, we have seen ^e, are applicable only to actions of *assumpsit* and *debt*; and, in *assumpsit*, the action must be described as an action on *promises*, and not as an action of *trespass on the case*, or of *trespass on the case upon promises*: Therefore, where the writ of *capias* was in an action *on the case*, and the *affidavit* to hold to bail was for goods sold and delivered, and the amount of the debt was indorsed on the writ, the court held that the arrest was irregular, and that the defendant was entitled to be discharged out of custody ^f. So, where the defendant having been held to bail on a *capias*, which described the action as an action of *trespass on the case*, and the arrest, as appeared by indorsement on the writ, was for a debt of 1200*l.*, the court cancelled the bail bond, upon the defendant's entering a common appearance ^g. But *bail* cannot apply to set aside the *capias* against their principal, on the ground of the action being described therein as an action of *trespass on the case upon promises* ^h: And such a *capias* being irregular only, and not void, the mistake must be taken advantage of, by an application to set it aside for irregularity ^h.

^a Hill v. Harvey, 4 Dowl. Rep. 163.

² Crompt. M. & R. 307. 1 Gale, 185.

10 Leg. Obs. 509, 10. S. C.

^b Loveitt v. Hill, 4 Dowl. Rep. 579.

11 Leg. Obs. 356, 7. S. C. *per Littledale*, J.

^c Buffle v. Jackson, 2 Dowl. Rep. 505.

8 Leg. Obs. 380, 81. S. C. *per Taunton*, J.

^d Bosler v. Levy, (*or* Border v. Levi,) 1 Bing. N. R. 362. 1 Scott, 270. 3 Dowl. Rep. 150. 9 Leg. Obs. 206. S. C.

On this point Mr. Justice *Littledale* was of opinion, that if the defendant's residence be sufficiently described in a *capias*, with the exception of the county, that defect is supplied by the direction of the writ to the sheriff; *Perring v. Turner*, 3 Dowl. Rep. 15. and *Tindal*, Ch. J. and *Gaselee*, J.

were of the same opinion, in the case of *Bosler v. Levy* above referred to; but *Vaughan*, J. and *Bosanquet*, J. were of a different opinion.

^e *Ante*, 68.

^f *Barker v. Weedon*, 1 Crompt. M. & R. 396. 4 Tyr. Rep. 660. 2 Dowl. Rep. 707. S. C.

^g *Richards v. Stuart*, 10 Bing. 319. 3 Moore & S. 774. 2 Dowl. Rep. 752. S. C.

^h *Gurney v. Hopkinson*, 1 Crompt. M. & R. 587. 5 Tyr. Rep. 211. 3 Dowl. Rep. 189. S. C. and see *Ward v. Tummon*, 1 Ad. & E. 619. 4 Nev. & M. 876. S. C. *Cooper v. Wheale*, 4 Dowl. Rep. 281. 1 Har. & W. 525. 11 Leg. Obs. 183, 4. S. C.

The writ of *capias* must bear *date* on the day on which it is issued^a; which requisite, we have seen^b, is not satisfied by a day being *indorsed* on the writ: and the omission of the day of the month in the *teste* of the copy of the writ, though the month itself is named, is fatal^c. This writ must be *tested* in the name of the Lord Chief Justice, or Lord Chief Baron, of the court from which it issues; or, in case of a vacancy of such office, then in the name of a *senior puisne* judge of the said court^d; and, by the terms of it^e, is to be returned by the sheriff, &c. immediately after the execution thereof: but it is not sufficient, for the purpose of outlawry, or waiver, if the same be returned within less than *fifteen* days after the delivery thereof to the sheriff, or other officer to whom the same shall be directed^f.

Date and *teste* of writ.

When to be returned.

A *memorandum* is required to be subscribed to the writ, stating that it is to be executed within *four* calendar months from the date thereof, including the day of such date, and not afterwards^g. And the following *warning*^h to the defendant must be thereunder written, or indorsed thereon: 1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant, before the end of the term next after such detainer or arrest, and proceed thereon to judgment and executionⁱ: 2. If a defendant, being arrested on this writ, shall have made a deposit of money, according to the statute 7 & 8 Geo. IV. c. 71. and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution^k: 3. If a defendant, having given bail on the arrest, shall omit to put in special bail, as required, the plaintiff may proceed against the sheriff, or on the bail bond^l: 4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within *eight* days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution^m. The sum for which the defendant is to be arrested and holden to special

Memorandum to be subscribed to.

Warning to defendant on.

Indorsements on.

^a Stat. 2 W. IV. c. 39. § 12.

^b *Ante*, 70.

^c Perring v. Turner, 3 Dowl. Rep. 15.

^d Stat. 2 W. IV. c. 39. § 12.

^e Sched. thereto, No. 4.

^f Stat. 2 W. IV. c. 39. §. 6.

^g Sched. thereto, No. 4. Append. to Tidd Sup. 1882. p. 274.

^h *Id. ib.*

ⁱ For the proceedings in actions against prisoners in custody of the sheriff, &c., see Tidd Prac. 9 Ed. 341, &c., and against those in custody of the marshal or warden, *post*, Chap. XV.

^k *Post*, Chap. XII.

^l *Post*, Chap. XIII.

^m *Post*, Chap. XII.

bail, by *affidavit* or judge's order, must also be indorsed on the writ ^a; with the name and place of abode of the plaintiff, or his attorney, by whom the same was issued ^b, and the amount of the debt and costs claimed by the plaintiff ^c. It also seems, that the place of abode and addition of the party against whom the writ issues, or such other description of him as the plaintiff's attorney or agent may be able to give, should, at least in the King's Bench, be indorsed on the writ ^d. And there is a clause in the uniformity of process act ^e, that "all such proceedings as are mentioned in any writ, notice, or warning, issued under that act, shall and may be had and taken, in default of the defendant's appearance, or putting in special bail, as the case may be."

Proceedings in default of appearance, or special bail.

Issuing, signing, and sealing *capias*.

Præcipe for.

The writ of *capias* is issued by the proper officer; and signed, and sealed, in like manner as the writ of *summons* ^f, or *distringas* ^g: and, at the time of issuing it, the plaintiff's attorney, we have seen ^h, should deliver to the officer by whom it is issued, a *præcipe* ⁱ, or note of instructions, stating the county, nature of the writ, names of the parties, and cause of action, concisely, with the name of the plaintiff's attorney, and date. But where the *præcipe* did not disclose that the *capias* was indorsed "Bail by *affidavit* for 600*l.*," the court held the omission not to be a ground for setting aside the *capias* ^k. And the mere fact of a *præcipe* not being to be found, is no ground for setting aside proceedings to outlawry, if it be sworn, that a *præcipe* was at one time left in the office ^l. In bailable cases, it is usual to make an *affidavit* of the cause of action, at the time of issuing the writ, and to indorse the sum sworn to thereon.

Affidavit of cause of action.

Delivery of *capias*, with copies thereof, &c. to sheriff, &c.

^a Sched. to stat. 2 W. IV. c. 39. No. 4, 5. Append. to Tidd *Sup.* 1833. p. 274. and see stat. 12 Geo. I. c. 29. § 2. which was formerly considered as merely *directory* to the sheriff, and did not avoid the process, when the sum sworn to was not indorsed upon it. Tidd *Prac.* 9 Ed. 159. *Sup.* thereto, 1830, p. 65. *Dorrington v. Bricknell*, 11 Moore, 445. *Martin (or Evans) v. Bidgood*, 12 Moore, 236. 4 Bing. 63. S. C. As to the effect of this indorsement in evidence, see *Brown v. Dean*, 5 Barn. & Ad. 848. 2 Nev. & M. 316. S. C. As to the practice of holding the defendant to special bail, by order of a judge, see Tidd *Prac.* 9 Ed. 166: And for

the forms of *affidavits* for that purpose, Append. thereto, Chap. X. § 86. 88; and of the judge's order thereon, *id.* § 87.

^b *Ante*, 70.

^c *Post*, 100, 101. Append. to Tidd *Sup.* 1833, p. 274.

^d Append. to Tidd *Sup.* 1833, p. 274.

^e Stat. 2 W. IV. c. 39. § 16.

^f *Ante*, 71.

^g *Ante*, 80.

^h *Ante*, 72.

ⁱ Append. to Tidd *Sup.* 1833, p. 272.

^k *Usborne v. Pennell*, 10 Bing. 531. 4 Moore & S. 431. 2 Dowl. Rep. 801. S. C.

^l *Probert v. Rogers*, 3 Dowl. Rep. 176.

many copies thereof should be delivered to him, together with every memorandum, or notice, subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon, or served therewith^a: which copies should strictly correspond with the writ of *capias*: Therefore, where the copy differed in date from the writ, the court refused to allow it to be amended, but set aside the service, and directed the defendant to be discharged, on entering a common appearance^b. So the party was discharged, where the writ was directed to the sheriffs, and a copy served upon him, directed to the sheriff of London^c. And the court, in one case^d, went so far as to discharge the defendant, where the copy of the *capias* served upon him, was directed to the sheriff of *Middlesex*, instead of *Middlesex*: but this decision was afterwards disapproved of by the court^e; and from other cases it seems, that the court will not set aside the copy of a writ of *capias*, served on the defendant, on account of any trifling variance, which does not affect the sense, and is not calculated to mislead the defendant^f.

Correspondence
of copies with
writ of *capias*.

If the defendant cannot be taken on the writ of *capias*, the sheriff, on being required to return it, by order of the court or a judge, should return *non est inventus*^g; and thereupon, the plaintiff may either sue out an *alias*, and afterwards, if necessary, a *pluries capias*, for arresting the defendant, or issue an *exigi facias*, and proceed to outlawry. And, except for the purpose of preventing the effect of the statute of limitations, or of proceeding to outlawry, a *capias* need not be returned, previously to issuing an *alias*^h. There is a

Proceedings,
when defendant
cannot be ar-
rested.

^a Stat. 2 W. IV. c. 39. § 4. *Ante*, 89, 90.

^b Byfield v. Street, 3 Moore & S. 406. 10 Bing. 27. 2 Dowl. Rep. 739. S. C.

^c Nicol v. Boyn, 10 Bing. 339. 3 Moore & S. 812. 2 Dowl. Rep. 761. S. C.; and see Barker v. Weedon, 2 Dowl. Rep. 707. 1 Crompt. M. & R. 396. 4 Tyr. Rep. 860. S. C.; but see Clutterbuck v. Wiseman, (or Wildman,) 2 Crompt. & J. 213. 2 Tyr. Rep. 276. S. C.

^d Hodgkinson v. Hodgkinson, 3 Nev. & M. 564. 1 Ad. & E. 533. 2 Dowl. Rep. 535. 8 Leg. Obs. 415. S. C.; and see Barker v. Weedon, 1 Crompt. M. & R. 396. 4 Tyr. Rep. 860. 2 Dowl. Rep. 707. S. C.; but see Colston v. Berens, 3 Dowl. Rep. 253. Same v. Same,

5 Tyr. Rep. 511. Sutton v. Burgess, 1 Crompt. M. & R. 770. 5 Tyr. Rep. 320.

1 Gale, 17. S. C. *semb. contra*.

^e Colston v. Berens, (or Berends,) 3 Dowl. Rep. 253. 1 Crompt. M. & R. 833. S. C. Sutton v. Burgess, 1 Crompt. M. & R. 770. 5 Tyr. Rep. 320. 3 Dowl. Rep. 489. 1 Gale, 17. S. C.

^f Pocock v. Mason, 1 Scott, 51. 1 Bing. N. R. 245. 9 Leg. Obs. 109. S. C. Sutton v. Burgess, 1 Crompt. M. & R. 770. 5 Tyr. Rep. 320. 3 Dowl. Rep. 489. 1 Gale, 17. S. C. Cooper v. Wheale, 4 Dowl. Rep. 281. 1 Har. & W. 525. 11 Leg. Obs. 133, 4. S. C.

^g Append. to Tidd Sup. 1833, p. 286.

^h Gregory v. Des Anges, 3 Bing. N. R. 85.

clause however, in the uniformity of process act^a, that "nothing therein contained shall subject any person to outlawry, or waiver, who, by reason of any privilege, usage, or otherwise, may now by law be exempt therefrom."

Alias and pluries capias.

May be directed to sheriff of another county.

Forms of.

How issued, &c.

Alias capias unnecessary, when plaintiff does not proceed on first writ.

The writs of *alias* and *pluries capias* are *non omittas* writs, directed to the sheriff, or other officer by whom they are to be executed; commanding him, (as *before*, or *theretofore*, he had been commanded,) to take the defendant, &c. (as in the first writ of *capias*): And, by a general rule of all the courts^b, "any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county; the plaintiff, in such case, referring to the preceding writ or writs, as directed to the sheriff to whom they were in fact directed^c. The forms of these writs are given in the rule^d, and will be found in the *Appendix* to the *third Supplement*^e: and there should be the like *memorandum*, warning, and indorsements thereon, as on the first writ. These writs are issued, on proper *præcipes*^f; and signed, sealed, and executed, in like manner as the first writ of *capias*. But it has been determined, that if a writ of *capias* be issued, on an *affidavit* of debt, into one county, and no proceeding be taken thereon, the plaintiff need not issue an *alias capias*; but another *original* writ of *capias* may be issued into another county, on the same *affidavit*^g. Where the plaintiff had commenced his action by bill of *Middlesex*, with a view of saving the statute of limitations, before the uniformity of process act came into force, and afterwards continued it, by *alias* and *pluries* bills of *Middlesex*, the court of King's Bench directed the signer of writs to sign a *pluries* bill of *Middlesex*, issued after the statute 3 & 4 W. IV. c. 67^h. And a *capias* issued after the uniformity of process actⁱ, upon an *affidavit* sworn previously to the passing of that act, before the deputy signer of the bills of *Middlesex*, is not irregular^k. So, in the

^a Stat. 2 W. IV. c. 89, § 19. And as to the exemption from outlawry or waiver, see Tidd *Prac.* 9 Ed. 181.

^b R. M. 3 W. IV. reg. 6. 4 Barn. & Ad. 3. 9 Bing. 444. 1 Crompt. & M. 3. By this rule it appears, that the *alias* and *pluries capias* are made to answer the purpose of *testatum* writs.

^c Append. to Tidd *Sup.* 1833. p. 277.

^d R. M. 3 W. IV. reg. 7. 4 Barn. & Ad. 3. 9 Bing. 445. 1 Crompt. & M. 3.

^e Append. to Tidd *Sup.* 1833. p. 277.

^f *Id. ib.*

^g Rodwell v. Chapman, 1 Crompt. & M. 70. 1 Dowl. Rep. 634. 1 Tyr. & G. 41. (a.) S. C. and see Dunne v. Harding, 4 Moore & S. 450. 10 Bing. 553. 2 Dowl. Rep. 803. S. C.

^h Finney (or Firnie) v. Montague, 2 Nev. & M. 804. 5 Barn. & Ad. 877. 7 Leg. Obs. 139, 40. S. C. and see Dickenson v. Teague, 1 Crompt. M. & R. 241. 4 Tyr. Rep. 450. S. C.

ⁱ 2 W. IV. c. 39.

^k Young v. Beck, 1 Crompt. M. & R. 448. 5 Tyr. Rep. 24. Beck v. Young,

Common Pleas, where a *capias* into *Sussex* was issued, upon an *affidavit* filed with the *filacer* for that county, and returned *non est inventus*, the court held, that an *alias capias* might be issued by *continuance* into another county, on the same *affidavit*^a.

The writ of *exigi facias*, and process of outlawry, as now used, are founded on the statute 2 W. IV. c. 39^b; by which it is enacted, that "upon the return of *non est inventus*, as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of *non est inventus* and *nulla bona*, as to any defendant against whom such writ of *distringas* as thereinbefore mentioned shall have issued, whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant, by writs of *exigi facias*^c, and proclamation^d, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum*, issued after an original writ^e: Provided always, that every such writ of *exigent*, proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and every such first writ of *exigent* and proclamation shall bear *teste* on the day of the return of the writ of *capias*^f, or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of *exigent* and proclamation shall bear *teste* on the day of the return of the next preceding writ^g: and no

Proceedings to outlawry, or waiver, on mesne process.

3 Dowl. Rep. 280. S. C. but see *Same v. Same*, 2 Dowl. Rep. 462. 8 Leg. Obs. 331. S. C. *contra*.

^a *Coppin v. Potter*, 10 Bing. 441. 4 Moore & S. 272. 2 Dowl. Rep. 785. S. C. *Rodwell v. Chapman*, 1 Crompt. & M. 70. 1 Dowl. Rep. 634. 1 Tyr. & G. 41. (a.) S. C. *Richards v. Stuart*, 10 Bing. 322. *Nicholson v. Leman*, (Lemon, or Rowe,) 2 Dowl. Rep. 296. 4 Tyr. Rep. 308. 2 Crompt. & M. 469. S. C. *Dunne v. Harding*, 4 Moore & S. 450. 10 Bing. 553. 2 Dowl. Rep. 803. S. C. *Ramsden v. Maugham*, 1 Tyr. & G. 40. 2 Crompt. M. & R. 634. 1 Gale, 345. 4 Dowl. Rep. 403. 11 Leg. Obs. 407. S. C. *Rock v. Johnson*, 1 Tyr. & G. 43. 4 Dowl. Rep. 405.

11 Leg. Obs. 476, 71. S. C. *Tidd Prac.* 9 Ed. 134. 180.

^b § 5.

^c *Append. to Tidd Sup.* 1833. p. 277, 8.

^d *Id.* 278, 9.

^e For the mode of proceeding to outlawry, or waiver, on an *original* writ, before the statute 2 W. IV. c. 39. see *Tidd Prac.* 9 Ed. 130, &c.

^f The writ of *capias* not being returnable on any particular day, the first writ of *exigent* and proclamation, must, it seems, bear *teste* on the day on which the sheriff makes his return to the writ of *capias*.

^g For the *teste* and return of writs of *exigi facias*, and proclamation, &c. before the statute 2 W. IV. c. 39. see *Tidd Prac.* 9 Ed. 132, 3.

PROCESS OF OUTLAWRY.

"such writ of *capias* or *distringas* shall be sufficient, for the purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff, or other officer to whom the same shall be directed." ^a In proceeding to outlawry, the writ of *capias* may be directed to the sheriffs of *London*, although the defendant reside in a distant county ^b: and it is no objection, that the writ of *capias* appears to have been returned *non est inventus*, before the four months expired, it being so done by order of a judge, which need not be noticed on the writ ^c. In the Common Pleas, it is not necessary that a *pluries capias* should be stamped by the clerk of the warrants, to authorize the *exigenter* to make out an *exigent* ^d. And the *exigent* is not a writ within the meaning of the *twelfth* section of the uniformity of process act ^e, which directs that every writ, issued by authority of that act, shall bear date on the day on which the same shall be issued ^f. Where, to a special *capias utlagatum*, the sheriff returned an inquisition, finding that the defendant was a beneficed clergyman, having no lay fee, the court of Exchequer, upon motion, awarded a writ of sequestration, upon reading the transcript of the outlawry and inquisition ^g. But where, to a writ of *capias utlagatum*, the sheriff returned that the defendant had no goods, nor any lay fee, within his bailiwick, but that he was a beneficed clergyman, without stating the name or situation of the benefice, the court refused a writ of sequestration; but suggested a motion for a rule, calling upon the sheriff to amend his return ^h.

Outlawry, or waiver, after judgment.

By the uniformity of process act it is enacted, that "after judgment given in any action commenced by writ of *summons* or *capias*, under the authority of that act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or

^a Stat. 2 W. IV. c. 39. § 5. And for the *teste* and *return* of process by *original*, before the statute 2 W. IV. c. 39. see Tidd *Prac.* 9 Ed. 107. 129, 30; of the *capias quare clausum fregit*, in the Common Pleas, *id.* 153; and of process in the Exchequer, *id.* 157.

^b *Morris v. Davies*, 4 Dowl. Rep. 317. 1 Har. & W. 513. 11 Leg. Obs. 101, 2. S. C.

^c *Lewis v. Davison*, 1 Crompt. M. & R. 655. 658. 5 Tyr. Rep. 198. 3 Dowl. Rep. 272. 274, 5. S. C.

^d R. H. 2 W. IV. reg. I. § 94. 3

Barn. & Ad. 398. 8 Bing. 303. 2 Crompt. & J. 195.; but see R. H. 2 & 3 Jac. II. R. H. 14 & 15 Car. II. reg. II. C. P.

^e 2 W. IV. c. 39. *Anie*, 70.

^f *Lewis v. Davison*, 1 Crompt. M. & R. 658. 5 Tyr. Rep. 198. 3 Dowl. Rep. 275. S. C.

^g *Rex v. Hind*, 1 Crompt. & J. 389. 1 Dowl. Rep. 286. *In re Hinde*, 1 Tyr. Rep. 347. S. C. *Rex v. Armstrong*, 3 Dowl. Rep. 760. 2 Crompt. M. & R. 205. 5 Tyr. Rep. 752. 10 Leg. Obs. 348. S. C.

^h *Rex v. Powell*, 1 Meeson & W. 321.

"waiver given, in such manner, and in such cases, as may now be lawfully done after judgment, in an action commenced by *original writ*": Provided always, that every outlawry, or waiver, had under the authority of that act, shall and may be vacated or set aside, by writ of error or motion, in like manner as outlawry or waiver, founded on an *original writ*, may now be vacated or set aside."^b Where a bailable *capias*, upon which a defendant was outlawed, had been issued upon a defective *affidavit*, the court, on motion, reversed the outlawry, on payment of costs, the defendant entering a common appearance^c. And where the plaintiff, knowing that the defendant was abroad, and that he was represented by an attorney in this country, without making any application to the attorney, sued out a *capias* against the defendant, with orders to the sheriff to return *non est inventus*, and then proceeded to outlawry, the court, upon an *affidavit* of these facts, set aside the outlawry, with costs^d. But the court will not set aside the proceedings to outlawry on motion, unless the application be made shortly after the defendant has notice of the objection^e.

Vacating, or setting aside.

In the Exchequer, the defendant could not formerly have been outlawed, as the plaintiff could not proceed therein by *original writ*^f; but this may now be done, by the statute 2 W. IV. c. 39. § 5^g: and it is declared thereby, that "for the purpose of proceeding to outlawry and waiver, upon writs of *capias* or *distringas* returnable in the court of Exchequer, it shall and may be lawful for the Lord Chief Baron of the said court, and he is thereby required, to appoint from time to time a fit person, holding some other office in the said court, to execute the duties of a *filazer*, *exigenter*, and clerk of the *outlawries*, in the same court."^h

In Exchequer.

Filazer, &c. by whom appointed.

^a For the mode of proceeding to outlawry after judgment, see Tidd *Prac.* 9 Ed. 131. 1028. And for the form of a writ of *exigi facias* for that purpose, see Append. to Tidd *Sup.* 1833. p. 279.

^b Stat. 2 W. IV. c. 39. § 6. And for the manner of reversing an outlawry, by writ of error or motion, see Tidd *Prac.* 9 Ed. 138, &c.

^c Houlditch v. Swinfen, 3 Scott, 170. 5 Dowl. Rep. 37. S. C.

^d Figou v. Drummond, 1 Bing. N. R.

354. 1 Scott, 264. S. C.

^e Anderdon v. Alexander, (or Humphrey,) 2 Dowl. Rep. 267. 7 Leg. Obs. 110. S. C.

^f Horton v. Peake, 1 Price, 309. Tidd *Prac.* 9 Ed. 38. 132.

^g 2 Dowl. Rep. 42. (a.)

^h Stat. 2 W. IV. c. 39. § 7. And as to the present and future appointment of *filazer*, and clerk of the *errors*, in the court of Exchequer, see stat. 2 & 3 W. IV. c. 110. §§ 4. 9.

CHAP. VIII.

Of the TESTE and RETURN of PROCESS; MEMORANDA and INDORSEMENTS thereon; IRREGULARITY in, and AMENDMENT of same; and ENTRY thereof on RECORD, &c.

Teste and return of process.

SINCE the alteration of the Terms and Returns, by the statutes 11 Geo. IV. & 1 W. IV. c. 70. § 6. and 1 W. IV. c. 3. all process in *personal* actions may, by subsequent acts ^a, with a very few exceptions, be *tested* and returned in *vacation*, as well as in *term* time.

Duration of writs.

By the uniformity of process Act ^b, "no writ, issued by authority of "that act, shall be in force for more than *four* calendar months from "the day of the date thereof, including the day of such date:" And accordingly, by the Schedule annexed thereto, a *memorandum* is required to be subscribed to writs of *summons* and *capias*, and *alias* and *pluries summons* and *capias*, stating that they are to be served or executed within the above period^c: but no such *memorandum* is required to be subscribed to writs of *distringas*, *exigent*, or *proclamation*, which are returnable on a day certain in term.

Memorandum to be subscribed to.

Indorsement on, of name and place of abode of plaintiff's attorney, &c.

By the statute 2 Geo. II. c. 23^d. it was enacted, that "every writ and process for arresting the body, and every writ of execution, or some *label* annexed to such writ or process, and every warrant made

^a By the uniformity of process Act, 2 W. IV. c. 39. § 12. every writ issued by authority of that act shall, we have seen, (*ante*, 70.) bear date on the day on which the same shall be issued. And for the *teste* and return of the writ of *summons* and *distringas*, *vide* same act, *ante*, 70. 80; of the *capias*, and process of outlawry, same act, *ante*, 89. 93, 4; of the writ of *detainer*, same act, *post*, Chap. XV.; of the writ of *inquiry* of damages, stat. 1 W. IV. c. 7. *post*, Chap. XXII.; of the writ of *trial*, stat. 3 & 4 W. IV. c. 42. § 17. *post*, Chap. XXXIII.; of the *jury* process, 3 & 4 W. IV. c. 67. §

2. *post*, Chap. XXXIV.; of writs of *execution*, stat. 1 W. IV. c. 7. 3 & 4 W. IV. c. 67. § 2. *post*, Chap. XLI.; and of writs in the Common Pleas at *Lancaster*, stat. 4 & 5 W. IV. c. 62. § 3.

^b 2 W. IV. c. 39. § 10. and see *Sewell v. Brown*, 1 *Hodges*, 317. *Lemon v. Lemon*, 2 *Scott*, 506.

^c Sched. to stat. 2 W. IV. c. 39. No. 1. 4. 6. *Append. to Tidd Sup.* 1883, pp. 263, 4. 274.

^d § 22.; and see *Tidd Prac.* 9 Ed. 159. *Shephard v. Shum*, 2 *Crompt. & J.* 632. 2 *Tyr. Rep.* 742. *S. C.*

out thereon, should, before the service or execution thereof, be subscribed or indorsed with the name of the attorney, clerk in court, or solicitor, written in a common legible hand, by whom such writ, &c. respectively were sued forth; and where such attorney, &c. was not the person *immediately* retained or employed by the plaintiff, then also with the name of the attorney, &c., so immediately retained or employed, to be subscribed or indorsed and written in like manner." By a subsequent statute^a, where bailable process was issued by the plaintiff in his own person, the sheriff was required not to execute the same, unless delivered by an attorney, &c., and indorsed with his name and place of abode. And now, by the statute 2 W. IV. c. 39. "every writ issued by authority of that act, shall be indorsed with "the name and place of abode of the attorney actually suing out the "same; and in case such attorney shall not be an attorney of the "court in which the same is sued out, then also with the name and "place of abode of the attorney of such court, in whose name such "writ shall be taken out; but in case no attorney shall be employed "for that purpose, then with a *memorandum*, expressing that the "same has been sued out by the plaintiff in person, mentioning the city, "town, or parish, and also the name of the hamlet, street, and number "of the house, of such plaintiff's residence, if any such there be."^b

This statute seems to apply to *serviceable*, as well as *bailable* process^c. And, by a general rule of all the courts^d, "when the attorney actually suing out any writ, shall sue out the same as *agent* for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ."

Of country attorney's name, &c. on writ sued out by agent.

The form of the indorsement required by the schedule to the above statute^e, to be made on the writ of *summons*, if no attorney be employed, is "This writ was issued in person by *A. B.* who resides at —." But where it appeared that the writ of *summons* had been indorsed by the plaintiff, who was his own attorney, as having been issued by *W. Y.* of *Nelson Terrace, Stoke Newington*, attorney, in person, this was holden to be sufficient; although *Nelson Terrace* was not his place of residence, but where he carried on his business^f:

Form of indorsement.

^a Stat. 7 & 8 Geo. IV. c. 71. § 8.

Ad. 3. 9 Bing. 445. 1 Crompt. & M. 4.

^b Stat. 2 W. IV. c. 39. § 12. Appendix to Tidd *Sup.* 1833. pp. 263. 264. 274. 280.

^c No. 4.

^d *Yardley v. Jones*, 4 Dowl. Rep. 45. 1 Har. & W. 332. 10 Leg. Obs. 526.

^e *Gilson v. Carr*, 4 Dowl. Rep. 618. 11 Leg. Obs. 390. S. C. per *Patteson, J.*

S. C.; but see *Lewis v. Davison*, 1 Crompt. M. & R. 655. 5 Tyr. Rep. 198. 3

^f R. M. 3 W. IV. reg. 9. 4 Barn. &

Dowl. Rep. 272. S. C. *semb. contra.*

and the court refused to set aside the copy of a writ of *summons*, because the word "*plaintiff*" was indorsed on the back of the writ, instead of the plaintiff's name^a. On a motion to set aside a writ of *summons*, it appeared that the name of the firm to which the attorney on the record belonged, was indorsed on the writ, instead of the attorney himself merely; and that the residence of the attorney was stated to be "*Gray's Inn, London*," although no part of *Gray's Inn* was in *London*; which the judge held to be sufficient^b. So, where the indorsement ran thus: "*Milne, Parry, Milne and Morris, agents for Shaw, Billericay*," without stating the christian names of the attorneys, the court held it to be sufficient^c. So, a writ indorsed with the name of the firm of the plaintiff's attorneys, is sufficient, although some of the persons whose names are given, shall have quitted the business^d. But an indorsement describing the attorney as of "*Southampton Buildings*" only, is insufficient^e. And the following indorsement has also been deemed insufficient: "*This writ was issued by W. L. of No. 32, Great James Street, Bedford Row, agent for the plaintiff in person, who resides at Barmouth*." ^f

Attorney to declare, whether writ issued by him, or with his authority, &c.

There is also a clause in the uniformity of process act^g, that "every attorney whose name shall be indorsed on any writ issued by authority of that act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith, whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court, or any judge of the same, or of any other court, shall so order and direct, declare

^a *Hannah (or Hennah) v. Wyman*, 2 Dowl. Rep. 678. 2 Crompt. M. & R. 239. 5 Tyr. Rep. 792. 1 Gale, 105. S. C.

^b *Engleheart v. Eyre (or Edwards)*, 2 Dowl. Rep. 145. 6 Leg. Obs. 138. S. C. per *Patteson, J.*; and see *King v. Monkhouse*, 2 Dowl. Rep. 221. 4 Tyr. Rep. 234. 2 Crompt. & M. 314. S. C. *Jelks v. Fry*, 3 Dowl. Rep. 37. *French v. Gregson*, 9 Leg. Obs. 138, 9. S. C. per *Little-dale, J.* *Arden v. Jones (or Garry)*, 4 Dowl. Rep. 120. 2 Scott, 186. 1 Hodges, 197. 10 Leg. Obs. 199. S. C. *Lewis v. Newton*, 1 Tyr. & G. 72. 1 Gale, 238. 2 Crompt. M. & R. 732. 4 Dowl.

Rep. 355. 11 Leg. Obs. 374. S. C.; but see *Constable v. Johnson*, 1 Crompt. & M. 88. 3 Tyr. Rep. 231. S. C.

^c *Pickman v. Collis*, 3 Dowl. Rep. 429.

^d *Hartley v. Rodenhurst*, 4 Dowl. Rep. 748. 12 Leg. Obs. 157. S. C.

^e *Rust v. Chine*, 3 Dowl. Rep. 555. 10 Leg. Obs. 116. S. C. and see *Arden v. Jones (or Garry)*, 4 Dowl. Rep. 120. 2 Scott, 186. 1 Hodges, 197. 10 Leg. Obs. 199. S. C.

^f *Lloyd v. Jones*, 1 Meeson & W. 548. 5 Dowl. Rep. 161. 12 Leg. Obs. 247. S. C.

^g 2 W. IV. c. 39. § 17.

"in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality and place of abode of the plaintiff; on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge of either of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants, who may have been arrested on any such writ, on entering a common appearance." And, by a general rule of all the courts^a, "if any attorney shall, as required by the said act, declare that any writ of *summons*, or writ of *capias*, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, until further order."

If not so issued, defendant may be discharged;

and all proceedings stayed, until further order.

In the King's Bench, there is a rule of court^b, that "the attorney concerned for the plaintiff in the cause, or his agent, shall, upon all *bailable* meane process, and every writ of attachment and *feri facias*, and *capias ad satisfaciendum*, indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him, as such attorney or agent may be able to give." On this rule it was determined, before the uniformity of process act, that a sheriff was not bound to execute *bailable* process, on which the place of abode and addition of the defendant were not indorsed, although, at the time of receiving the *capias*, he made no objection to the want of such indorsement^c. And the court set aside a *capias ad satisfaciendum*, on the ground that the rule had not been complied with; and that if the writ were suffered to remain in force, and the sheriff compelled to make a return, he might be subjected to the peril of an action for an escape^d. But the court would not discharge a defendant out of custody, on a *testatum capias ad satisfaciendum*, on the ground of the want of an indorsement on the *capias ad satisfaciendum*, pursuant to the above rule^e. And it has been determined, that so much of the above rule as requires that

Indorsement of defendant's place of abode and addition, on *bailable* process, &c. in K. B.

^a R. M. 3 W. IV. reg. 14. 4 Barn. & Ad. 4. 9 Bing. 447. 1 Crompt. & M. 6.

8 Leg. Obs. 270. S. C. *per Taunton, J.*

^b R. H. 2 & 3 Geo. IV. K. B. 5 Barn. & Ald. 560. 2 Chit. R. 377. 1 Dowl. & R. 471. and see Tidd Prac. 9 Ed. 156.

^d Clarke v. Palmer, 9 Barn. & C. 153. 4 Man. & R. 147. S. C.

^e Kemrick v. Nanney, 1 Dowl. Rep. 58.

^c Davidson v. Dunne, 4 Dowl. Rep. 119. and see Tarber (or Parker) v. French, 5 Nev. & M. 658. 12 Leg. Obs. 194. S. C.

on all bailable *mesne* process, the defendant's place of abode and addition shall be indorsed, is in effect repealed by the uniformity of process act ^a; and therefore, the want of such indorsement is no objection to a *capias*, issued under that act ^b. Such rule, however, is conceived to be still in force, as to the indorsements required to be made on writs of attachment, *feri facias*, and *capias ad satisfaciendum*. In the Exchequer, there is no rule, requiring the defendant's residence to be set out in a writ of *capias ad satisfaciendum*; and the court will not discharge a defendant out of custody, in consequence of its being omitted ^c. And though there is a rule in that court ^d, that "the name and address of the attorney issuing any writ shall be indorsed or written thereon, and also that the day, month and year, in which the same shall be issued, shall be indorsed or written on all writs to be issued in the office of Pleas of this court," yet this rule seems to have been virtually repealed by the uniformity of process act ^e.

Of attorney's name and address, &c. in Exchequer.

Indorsement of amount of debt and costs.

To ascertain the amount of the debt and costs claimed by the plaintiff, and to give the defendant an opportunity of paying them in the first instance, it is ordered, by a general rule of all the courts ^f, that "upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs ^g; and that upon payment thereof, within *four* days, to the plaintiff or his attorney, further proceedings will be stayed; but the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one *sixth* shall be disallowed, the plaintiff's attorney shall pay the costs of taxation:" which rule is declared, by a subsequent one ^h, to be applicable to all writs of *summons*, *distringas*, *capias*, and *detainer*, issued under the authority of the uniformity of process act, and to the copy

^a 2 W. IV. c. 39.

^b *Bodfield v. Padmore*, 5 Barn. & Ad. 1095. and see 3 Chit. Gen. Pr. 215, 16.

^c *Strong v. Dickenson*, 5 Dowl. Rep. 99. 1 Tyr. & G. 683. S. C.

^d R. M. 1 W. IV. reg. II. § 1. 1 Crompt. & J. 274, 5. 1 Tyr. Rep. 157, 8. and see *Shephard v. Shum*, 2 Crompt. & J. 632. 2 Tyr. Rep. 742. S. C.

^e 2 W. IV. c. 39. § 12.

^f R. H. 2 W. IV. reg. II. 3 Barn. & Ad. 390, 91. 8 Bing. 305, 6. 2 Crompt. & J. 199.

^g Append. to *Tidd Sup.* 1833. pp. 263. 270. 274. 278. And for bills of costs, as allowed on taxation in all the courts, on the above rule, see *Bills of Costs*, K. B., published by *Maswell*, in 1832.

^h R. M. 3 W. IV. reg. 5. 4 Barn. & Ad. 2. 9 Bing. 444. 1 Crompt. & M. 3.

of every such writ. On the former of these rules, it was determined that a bill against an *attorney*^a, or copy of a bill filed against a *prisoner*^b, was not *process*, within the meaning of that rule; and therefore, did not require an indorsement of the amount of the debt and costs claimed by the plaintiff: and the court will not set aside process, on account of the debt and costs not being indorsed upon it, according to the above rules, unless it appear by *affidavit*, that the cause of action is a *debt*^c; nor can it be set aside, on that ground, in an action on the bail bond^d. And where a stack of hay was sold by the defendant to the plaintiff, with liberty to keep it on the defendant's premises for a certain time, and the hay was seized as a distress, before the expiration of that time, the court held that it was not necessary to indorse on the writ of *summons*, sued out for the above cause of action, the amount of the debt and costs^e.

The form prescribed by the above rules directs, that if the amount of the debt and costs be paid to the plaintiff, or his attorney, within four days from the *service* of the writ, further proceedings will be stayed^f; and this form must be strictly adhered to: Therefore, where, in the indorsement on the *copy* of a writ of *capias*, it was stated, that further proceedings would be stayed, on payment of the debt and costs within four days from the *execution* thereof^g, or of the *arrest* thereon^h, the court held it to be irregular: but an indorsement requiring the debt and costs to be paid within four days after *arrest or service*, is sufficientⁱ. So, where the plaintiff

Form of such
indorsement.

^a *Lewellin (or Swellin) v. Norton*, 4 Barn. & Ad. 368. (b.) 1 Dowl. Rep. 416. 4 Leg. Obs. 413. S. C. *per Taunton, J.*

^b *Long v. Wordsworth*, 4 Barn. & Ad. 367.

^c *Curwin v. Moseley*, 1 Dowl. Rep. 432. 4 Leg. Obs. 301. S. C. *per Patteson, J.* and see *Anon.* 9 Leg. Obs. 10. *per Ld. Denman, Ch. J.*

^d *Rowland v. Dakeyne, (or Dalreynne)*, 2 Dowl. Rep. 632. 8 Leg. Obs. 108, 9. S. C. *Smart v. Lovick*, 3 Dowl. Rep. 34. 9 Leg. Obs. 188. S. C. *per Littledale, J.*

^e *Perry v. Patchett*, 1 Crompt. M. & R. 87. 4 Tyr. Rep. 725. 2 Dowl. Rep. 667. S. C.

^f *R. H. 2 W. IV. reg. II.* 3 Barn. & Ad. 390, 91. 8 Bing. 305, 6. 2

Crompt. & J. 199. Append. to *Tidd Sup.* 1832. p. 101.

^g *Shirley v. Jacobs*, 1 Scott, 67. 3 Dowl. Rep. 101. 9 Leg. Obs. 76, 7. S. C. *Urquhart v. Dick*, 3 Dowl. Rep. 17. 9 Leg. Obs. 221, 2. S. C. *Colls v. Morpeth*, 3 Dowl. Rep. 23. 9 Leg. Obs. 221. S. C. *per Littledale, J.* and see *Usborne v. Pennell*, 10 Bing. 531. 4 Moore & S. 431. 2 Dowl. Rep. 801. S. C. *Lord Paget v. Stockley*, 1 Hodges, 317.

^h *Cooper (or Hooper) v. Waller (or Walker)*, 3 Dowl. Rep. 167. 1 Crompt. M. & R. 437. 5 Tyr. Rep. 130. S. C. *Tabram v. Thomas*, 3 Dowl. Rep. 167. 9 Leg. Obs. 254. S. C.

ⁱ *Sutton v. Burgess*, 1 Crompt. M. & R. 770. 5 Tyr. Rep. 320. 3 Dowl. Rep. 489. 1 Gale, 17. S. C.

claims a sum for *debt*, with *interest* thereon from a certain day, it is sufficiently certain *. And where the *affidavit* of debt was for money lent generally, and the indorsement on the *capias* stated the debt to be due on a promissory note, the court held it not to be a variance †. An irregularity in the indorsement is no ground for setting aside the writ itself, or for cancelling the bail bond, if the plaintiff, upon notice of the objection, amends the defect, which he is allowed to do ‡, on payment of costs. Where the defendant fails to pay the debt and costs, within the time mentioned in the indorsement on the writ, he is not entitled to a stay of proceedings, on payment of the sum so indorsed §.

Statutes and rules respecting indorsements, when *directory*, or *imperative*.

The statutes and rules of court, respecting *indorsements* on *mesne* process, are in some cases considered as *directory* only, and in others as *imperative*. Where an act of parliament requires a thing to be done generally, (without requiring it to be done by any officer, &c. under a penalty,) and does not say that for want of the thing required, the writ, &c. shall be void, it has been said that such act is *directory* only, and proceedings ought not to be stayed for omitting it *. Thus, the statutes 5 & 6 W. & M. c. 21. § 4. and 9 & 10 W. III. c. 25. § 42. requiring the officer who signs bailable process to set down thereon the day and year of his signing the same, were holden to be *directory* only †. So, the statute 12 Geo. I. c. 29. which requires the sum specified in the *affidavit* of the cause of action, to be indorsed on the back of the writ or process for holding the defendant to special bail, was formerly considered to be merely *directory* to the sheriff; and not to avoid the process, when the sum sworn to was not indorsed upon it ‡. But it is now necessary, by the uniformity of process act §, that the sum sworn to, for which bail is required by *affidavit*, or order of a judge, should be indorsed on the writ of

* *Coppelo (or Coppels) v. Brown*, 1 Crompt. M. & R. 575. 5 Tyr. Rep. 217. 3 Dowl. Rep. 166. 9 Leg. Obs. 253. S. C. *Sealy v. Hearne*, 3 Dowl. Rep. 196. *per Parte*, B.

† *Patterson v. Habbersham*, 1 Hodges, 216.

‡ *Post*, 108.

§ *Bowditch (or Bowdidge) v. Slaney*, 4 Dowl. Rep. 140. 2 Scott, 197. 2 Bing. N. R. 142. 1 Hodges, 224, S. C.

* *Grice v. Allen, Barnes*, 414. Pr. Reg. 442. S. C.

† *Coleby v. Norris*, 1 Wils. 91. and see

Windle v. Ricardo, 3 Moore, 246. 1 Brod. & Bing. 17. S. C. *Millar (or Miller) v. Bowden*, 1 Crompt. & J. 563. 1 Price N. R. 104. 2 Tyr. Rep. 112. S. C. *Perry v. Turner*, 2 Crompt. & J. 23. 1 Price, N. R. 161. 2 Tyr. Rep. 128. 4 Dowl. Rep. 300. S. C.

‡ *Grice v. Allen, Barnes*, 414. Pr. Reg. 442. S. C. *Whiskard v. Wilder*, 1 Bur. 330.; but see *Hill v. Heale*, 2 New Rep. C. P. 202. *per Sir J. Mansfield*, Ch. J. *señb. contra*.

§ 2 W. IV. c. 39. Sched. No. 4, 5.

capias, or *detainer*. This indorsement, however, need not be dated ^a; and where the writ was indorsed, "Bail for 40*l.* and upwards, by affidavit," it was deemed sufficient ^a. The statute 2 Geo. II. c. 23. § 22. which directs the name of the attorney immediately retained or employed by the plaintiff, to be subscribed to or indorsed on the process, and the rule of court in the Exchequer ^b, which requires the name and address of the attorney issuing any writ, to be indorsed or written thereon, were, before the uniformity of process act ^c, considered as imperative ^d; and indorsing the name of the agent was not deemed sufficient: the object of the statute and rule being, to give the defendant an opportunity of settling the action, without incurring further expense; and if the name of the agent only were stated, who probably lives at a distance, the defendant would not have that opportunity ^d. It was, indeed, decided in one case ^e, by the court of Exchequer, that the latter part of the above rule, which requires the day of the month and year to be indorsed or written on the process, was merely *directory*; and the court would not set aside the service of process, because there was no such indorsement thereon: but this decision was afterwards overruled ^f. It is also now settled, that the rules of *Hil. 2 W. IV. reg. II.* and *Mich. 3 W. IV. reg. 5*: as to the indorsement on process, of the amount of the debt and costs claimed by the plaintiff, are not merely *directory*, but *imperative* ^g: for, as was observed by the late Mr. Justice Taunton, "to say that the rule is merely *directory*, is only, in other words, to say that it means nothing: We have determined to treat the dereliction of it, as an irregularity: It is a very important rule; and the object of it, which is to enable the defendant to pay debt and costs, before any unnecessary expense is incurred, would be disappointed, if this were not considered as an irregularity." ^g

^a Webb v. Lawrence, 2 Dowl. Rep. 81. 1 Crompt. M. & R. 806. 3 Tyr. Rep. 906. 6 Leg. Obs. 461. S. C.

^b R. M. 1 W. IV. reg. II. § 1. 1 Crompt. & J. 274, 5. 1 Tyr. Rep. 157, 8. Ante, 100.

^c 2 W. IV. c. 39.

^d Grice v. Allen, Barnes, 414. Pr. Reg. 442. S. C. Shephard (or Sheppard) v. Shum, 2 Tyr. Rep. 742. 2 Crompt. & J. 632. S. C. and see 3 Chit. Gen. Pr. 72, 3.

^e Millar (or Miller) v. Bowden, 1

Crompt. & J. 563. 1 Price, N. R. 104. 2 Tyr. Rep. 112. S. C.; and see Perry v. Turner, 2 Crompt. & J. 93. 1 Price, N. R. 161. 2 Tyr. Rep. 128. 1 Dowl. Rep. 300. S. C.

^f Ryley v. Boissomas, 1 Dowl. Rep. 383. 4 Leg. Obs. 26. S. C. Sheppard v. Shum, 2 Tyr. Rep. 742. 2 Crompt. & J. 633. S. C. and see Robinson v. Stewart, 1 Price, N. R. 43. 106. a. Chit. Pr. Addend. 32. (II.) 3 Chit. Gen. Pr. 78.

^g Ryley v. Boissomas, 1 Dowl. Rep. 383. 4 Leg. Obs. 26. S. C. Tomkins

Distinction between void and irregular process.

Consequence of omitting indorsements, &c. on writ, or copy.

Setting aside process, &c. for irregularity.

There is also a material distinction, to be attended to in practice, between *void* and *irregular* process. When the process is *void*, as was the case, before the uniformity of process act, if it were returnable on a *dies non*^a, or if a term intervened between the *teste* and return^b, it was so entirely *void*, that the sheriff was not bound to execute the same, and an action of *trespass* might have been maintained against him, or his officers, for so doing, or against the party, or his attorney, for issuing the writ. So, if a writ be issued against an *ambassador*, or his domestic servant, it is declared by statute^c, to be void to all intents and purposes: and a writ of *summons*, bearing date on a *Sunday*, is a nullity, which cannot be waived^d. But if the process be merely *irregular*, it is not *void*, but remains in force until the court, on motion, has set it aside; and the sheriff or party is not, in the mean time, liable to an action for what was done under it^e. And, by a general rule of all the courts^f, it is declared, that "if the plaintiff, or his attorney, shall omit to insert in, or indorse on any writ, or copy thereof, any of the matters required by the uniformity of process act^g to be by him inserted therein, or indorsed thereon, such writ, or copy thereof, shall not on that account be held void; but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or to any judge." This rule has been holden to be compulsory on the plaintiff^h: and it applies to process issued under the 2 W. IV. c. 39. against attorneys^h. Upon this rule, it appears that proceedings may be set aside for irregularity, in cases where the forms in the schedule to the uniformity of process act, are not strictly adhered toⁱ; or the *copies* do not correspond with the processⁱ: And a writ of *capias*, to answer the plaintiff in an action of *trespass on the case upon promises*, is, we have seen^k, merely *irregular*,

v. Chilcote, 2 Dowl. Rep. 187. 6 Leg. Obs. 333. S. C.

^a Mills v. Bond, 1 Str. 399. Kenworthy v. Peppiat, 4 Barn. & Ald. 238.

^b Shirley v. Wright, 2 Salk. 700. 2 Ld. Raym. 775. S. C. and see Tidd. Prac. 9 Ed. 515.

^c 7 Ann. c. 12. and see Tidd Prac. 9 Ed. 191.

^d Hanson v. Shackelton, 4 Dowl. Rep. 48. 1 Har. & W. 342. 10 Leg. Obs. 476. S. C. per Coleridge, J.

^e Phillips v. Biron, 1 Str. 509. Red-

dell (or Riddell) v. Pakeman, 2 Crompt. M. & R. 30. 1 Gale, 104. 5 Tyr. Rep. 721. 3 Dowl. Rep. 714. S. C. and see 3 Chit. Gen. Pr. 73.

^f R. M. 3 W. IV. reg. 10. 4 Barn. & Ad. 3. 9 Bing. 445, 6. 1 Crompt. & M. 4, 5.

^g 2 W. IV. c. 39.

^h Tomkins v. Chilcote, 2 Dowl. Rep. 187. 6 Leg. Obs. 333. S. C. per Taunton, J.

ⁱ Ante, 66. 85. 91.

^k Ante, 88.

and not void^a; and the defendant, to avail himself of the objection, must apply in proper time to set it aside^a.

A party, however, cannot take advantage of any error or defect in the process, after he has appeared to it^b, or taken the declaration out of the office^c, or obtained time to put in bail to the action^d; for it is the universal practice of the courts, that the application to set aside process for irregularity, should be made as early as possible, or, as it is commonly said, in the first instance^e: And accordingly, by a general rule of all the courts^f, "no application to set aside process or proceedings for irregularity, shall be allowed, unless made within a reasonable time; nor if the party applying has taken a fresh step, after knowledge of the irregularity." This rule has been holden to apply as well to the case of a prisoner, as to other persons^g. And as the plaintiff has now a right to go on with the cause in *vacation*, as well as in *term* time, where a defendant has been irregularly served with process early in vacation, he is not allowed to wait till the ensuing term; but is bound to apply in vacation, to a judge at chambers, if he wish to take advantage of the irregularity^h. It has also been determined, that a motion to set aside the service of a writ of *distringas*, for irregularity in the indorsements thereon, &c. must be made within a *reasonable* time after

Application for,
when made.

^a Gurney v. Hopkinson, 1 Crompt. M. & R. 587. 5 Tyr. Rep. 211. 3 Dowl. Rep. 189. S. C. and see Ward v. Tummon, 1 Ad. & E. 619. 4 Nev. & M. 876. S. C.

^b Rex v. Hare, 1 Str. 155. Wilson v. Finch, Barnes, 163. Wade v. Wadman, *id.* 167. Langley v. Bailiffs, &c. of East Retford, *id.* 415. Fox v. Money, 1 Bos. & P. 260. Dyer v. Bullock, *id.* 344. and see Tidd Prac. 9 Ed. 160, 61. 513.

^c Morgan v. Luckup, Cas. temp. Hardw. 242. Caswall v. Martin, 2 Str. 1072, 3. Marquand v. Mayor, &c. of Boston, Barnes, 416. Whale v. Fuller, 1 H. Blac. 222, 3. C. P.

^d Moore v. Stockwell, 6 Barn. & C. 76. 9 Dowl. & R. 124. S. C.

^e Petrie v. White, 3 Durnf. & E. 7. D'Argent v. Vivant, 1 East, 334, 5. Steele v. Morgan, 8 Dowl. & R. 450. Warren v. Cross, 9 Price, 637. Fynn (or Fyson) v. Kemp, 2 Dowl. Rep. 620. 4 Tyr. Rep. 990. 8 Leg. Obs. 491. S. C.

^f R. H. 2 W. IV. reg. 1. § 33. 3 Barn. & Ad. 378. 8 Bing. 292, 3. 2 Crompt. & J. 177.

^g Primrose v. Baddeley, 2 Dowl. Rep. 350. 2 Crompt. & M. 468. 4 Tyr. Rep. 370. S. C. Fife v. Bruere, 4 Dowl. Rep. 329. 1 Hodges, 317. 11 Leg. Obs. 310. S. C. Fownes v. Stokes, 4 Dowl. Rep. 125. 2 Scott, 205. S. C.; but see Rock v. Johnson, 1 Tyr. & G. 43. 4 Dowl. Rep. 405. 11 Leg. Obs. 470, 71. S. C. Taylor v. Slater, 2 Scott, 839. *semb. contra.*

^h Cox v. Tulloch, 1 Crompt. & M. 531. 3 Tyr. Rep. 578. 2 Dowl. Rep. 47. S. C. and see Ellison v. Roberts (or Elliston v. Robinson), 4 Tyr. Rep. 214. 2 Crompt. & M. 343. 2 Dowl. Rep. 241. 7 Leg. Obs. 366, 7. S. C. Lewis v. Davison, 1 Crompt. M. & R. 655. 5 Tyr. Rep. 198. 3 Dowl. Rep. 272. S. C. Excheq. Hinton v. Stevens, 4 Dowl. Rep. 283. 1 Har. & W. 521. 11 Leg. Obs. 100, 101. S. C.

the service thereof; and that *eighteen* days is an unreasonable delay in this respect, provided the defendant might have come earlier^a. So, where the writ of *summons* was served on the 25th October, but the application for the rule *viz* to set it aside, on the ground of an irregularity in the indorsement, was not made until the 3d November, that being the *first* day of term, (the *second* of the month having fallen on a Sunday,) the application was holden to be too late^b: and it seems, that a motion to set aside a writ of *summons* for irregularity, must be made within *four* days^c. Where an arrest was on the 29th January, and on the 10th March, the defendant made application to be discharged out of custody, on account of irregularity in the *capias*, the court held that the application was not made within a reasonable time, as required by the above rule^d: And the illness of a witness, to whom a commissioner of the court might be sent to take his *affidavit*, is no excuse for delay, in making an application to rescind an order for setting aside a writ of *summons*, on the ground of irregularity^e. But a lapse of *six* days was ruled not to be too great, to preclude a motion for setting aside the copy of a writ of *capias*, and discharging the defendant out of custody, for irregularity in the indorsement^f: And a defendant having delayed *two* months in making the application, is not a waiver of his right, if the *affidavit* on which he was arrested, has not been taken by a competent authority^g. So, where the service of a writ of *summons* was irregular, a defendant, it seems, is not bound to move to set it aside, until the notice of declaration be served; as he cannot until then know that the plaintiff intends to proceed^h. Where the writ was irregular, as being in *trespass*, and yet claiming a *debt*, and the defendant neglected to move to set it aside within proper time, yet, as it was followed by a declaration varying from the writ, *viz.*

^a Wright v. Warren, 3 Moore & S. 166. 2 Dowl. Rep. 724. S. C. and see Elliston v. Roberts, (or Elliston v. Robinson,) 2 Dowl. Rep. 241. 7 Leg. Obs. 366, 7. S. C. Fynn (or Fyson) v. Kemp, 2 Dowl. Rep. 620. 4 Tyr. Rep. 990. 8 Leg. Obs. 491. S. C. Gurney v. Hopkinson, 1 Comp. M. & R. 587. 5 Tyr. Rep. 211. 3 Dowl. Rep. 182. S. C. Ante, 88. Tidd Prac. 9 Ed. 161. 518.

^b Tyler v. Green, 3 Dowl. Rep. 439. 9 Leg. Obs. 173. S. C. and see Graves v. Walter, 1 Scott, 810. Hinton v. Stevens, 4 Dowl. Rep. 283. 1 Har. & W. 521. 11 Leg. Obs. 100, 101. S. C.

Chubb v. Nicholson, 1 Har. & W. 666.

^c Chubb v. Nicholson, 1 Har. & W. 666.

^d Foote v. Dick, 1 Har. & W. 207.

^e Orton v. France, 4 Dowl. Rep. 598. 1 Har. & W. 672. S. C.

^f Smith v. Pennell, 2 Dowl. Rep. 654. per Parke, B.; and see Jarvis v. Jones, 4 Dowl. Rep. 610. 1 Har. & W. 654. 11 Leg. Obs. 405, 6. S. C.

^g Sharpe v. Johnson, 2 Bing. N. R. 246. 2 Scott, 405. 1 Hodges, 298. 4 Dowl. Rep. 324. 11 Leg. Obs. 117, 18. S. C.

^h Davis v. Lawton, 11 Leg. Obs. 258. per Patteson, J.

in *assumpsit*, the court set aside both declaration and writ^a. And the entry of an appearance by a plaintiff for a defendant, does not operate as a waiver of an objection to the copy of the writ^b.

Before the uniformity of process act, the courts would in general have amended the process, where there was any thing to amend by^c: and the process by *original* might have been amended, as well as the process by *bill*^d. But, since the above act, all the judges have come to a resolution not to amend the process, if the forms prescribed by the schedule to the act are not strictly adhered to, except where the statute of limitations would otherwise be a bar to a fresh action^e. The plaintiff cannot alter his writ after service^f; and a notice not to appear to the copy of the writ first served, will not cure the defect^g. But where the action would otherwise be barred by the statute of limitations, the judges have, in several instances, allowed the process to be amended, on payment of costs: Thus, in an action against the inhabitants of a district, for damage done by a mob, on the 7 & 8 Geo. IV. c. 31., the court allowed the proceedings to be amended, by substituting the word "borough" for "hundred," there being no such hundred, and the time for commencing a fresh action having expired^h. So, in an action by executors, where the defendant pleaded in abatement the nonjoinder of one executor, who had not proved, the court allowed the process to be amended, on payment of costs; as the statute of limitations would have been a bar to a fresh actionⁱ. The court, in these cases, has power to amend the writ, because it is the act of the court, and a record in their own custody^j; but it is otherwise when they are called on to amend a copy, which is the act of the party, over which the court has no controul^k; and therefore, if the copy of a *capias* delivered to the defendant, do not exactly correspond with the original, the court will in no case allow it to be amended^l.

Amendment of process.

^a *Edwards v. Dignam*, 2 Dowl. Rep. 240. 4 Tyr. Rep. 213. 2 Cramp. & M. 346. S. C. *per Bayley*, B.

^b *Chalkley v. Carter*, 4 Dowl. Rep. 490. 1 Tyr. & G. 210. S. C.

^c *Tidd Prac.* 9 Ed. 161.

^d *Id.* 139. and the authorities there referred to.

^e *Lakin v. Watson*, (or *Massic*), 3 Dowl. Rep. 633. 4 Tyr. Rep. 339. S. C. *Mills v. Gossett*, 1 Scott, 313. *Partridge v. Wallbank*, (or *Wellbank*), 1 Mepson & W. 316. 5 Dowl. Rep. 93. 12 Leg. Obs. 101. S. C.

^f *Glenn v. Wilks*, 4 Dowl. Rep. 322. Anon. 11 Leg. Obs. 164. S. C.

^g *Horton v. Inhabitants of Stamford*, 2 Dowl. Rep. 96. 1 Cramp. & M. 773. 3 Tyr. Rep. 869. S. C. *Ante*, 88.

^h *Lakin v. Watson*, (or *Massic*), 3 Dowl. Rep. 633. 4 Tyr. Rep. 339. S. C.

ⁱ *Byfield v. Street*, 10 Bing. 28. 3 Moore & S. 406. 2 Dowl. Rep. 740. S. C. *per Tindal*, Ch. J.

^j *Id. ib.* *Nicol v. Boyn*, 10 Bing. 323. 3 Moore & S. 812. 2 Dowl. Rep. 761. S. C.

A distinction, however, has been made, between the effect of non-compliance with an act of parliament, and a rule of court: and on that ground, though the court will not in general allow the writ to be amended, if it do not follow the form prescribed by the act, yet where the indorsement of the amount of the sum claimed for debt and costs is defective, and does not follow the form directed by the rules of H. 2 W. IV. reg. II. and M. 3 W. IV. reg. 5, the judges have come to a general resolution, to allow the indorsement to be amended, on payment of costs, and proceedings to be stayed until *four* days after the amendment made, to give the defendant an opportunity of paying the debt and costs^a. But the court, in one case^b, determined, that a judge at chambers cannot amend the indorsement on a writ of *summons*, by reducing the amount of the claim indorsed upon it, in order to try the cause before the sheriff. In a subsequent case, however, it was holden, that where a cause is proper to be tried by the sheriff, under the writ of trial act, but by mistake a larger sum is indorsed on the writ than the plaintiff claims, and than is allowed by the act, the court will allow the writ to be amended^c.

Entry of process on record, to avoid statute of limitations.

In order to avoid the statute of limitations, it is, we have seen^d, necessary, by the uniformity of process act^e, that the writ of *summons* or *capias*, by which the action was commenced, and the return of *non est inventus*, should be entered of record, within *one* calendar month next after the expiration thereof, including the day of such expiration, and the roll docketed and filed in the treasury of the court. The writ was formerly entered on a roll of that term wherein it was returnable: and, in the King's Bench, it was entered in *hæc verba*: after which, the roll proceeded with an entry of the plaintiff's appearance, the sheriff's return of *non est inventus*, and continuance of the process from term to term, by *vicecomes non misit breve*, to the term of the declaration. In the Common Pleas, the roll merely contained a recital of the writ, with an entry of the plaintiff's appearance, and sheriff's return, &c.: But now, the process being the same in all the

^a *Urquhart v. Dick*, K. B. 3 Dowl. Rep. 17. 9 Leg. Obs. 221. S. C. *Shirley v. Jacobs*, C. P. 3 Dowl. Rep. 101. 1 Scott, 67. 9 Leg. Obs. 76; 7. S. C. *Cooper (or Hooper) v. Waller*, Excheq. 3 Dowl. Rep. 167. 1 Crompt. M. & R. 437. 9 Leg. Obs. 254. S. C. *Ld. Paget v. Stockley*, 1 Hodges, 317.

^b *Trotter v. Bass*, 3 Dowl. Rep. 407. 1 Bing. N. R. 516. 1 Scott, 403. 1

Hodges, 23. 9 Leg. Obs. 414. S. C. and see *Edge v. Shaw*, 4 Dowl. Rep. 189. 2 Crompt. M. & R. 415. S. C.

^c *Edge v. Shaw*, 4 Dowl. Rep. 189. 2 Crompt. M. & R. 415. S. C. *Frodsham v. Round*, 4 Dowl. Rep. 569. 1 Har. & W. 667. 11 Leg. Obs. 323, 4. S. C.

^d *Ante*, 16, 17.

^e 2 W. IV. c. 89. § 10. and see *Tidd Prac.* 9 Ed. 162.

courts, by the uniformity of process act^a, by which proceedings may be had in term or vacation^b, and continuances by *vicecomes non misit breve* being abolished, by a rule made on the law amendment act^c, the entry of the writ of *summons*, or *capias*, on the record, is dated on the day of the month and year on which it is made; and after setting out the writ *in hæc verba*, as was formerly done in the King's Bench, it proceeds to state the return of *non est inventus*, by the plaintiff, or his attorney, to the writ of *summons*, or by the sheriff to the writ of *capias*, within *one* calendar month next after the expiration of the writ, and that the defendant has not appeared to the action, according to the exigency thereof; and that the plaintiff thereupon prayed another writ to be issued, in continuation of the former one, which was granted to him, and issued by the court (setting it out *in hæc verba*); which last mentioned writ contained a *memorandum* indorsed thereon, or subscribed thereto, stating the day of the date of the first mentioned writ^d.

^a 2 W. IV. c. 39.

Barn. & Ad. Append. ii. 10 Bing. 464.

^b *Post*, 132, 3.

2 Crompt. & M. 11.

^c R. Pl. Gen. H. 4 W. IV. reg. 2. 5

^d Append. to Tidd *Sup.* 1833. p. 252, &c.

CHAP. IX.

Of the SERVICE of the WRIT of SUMMONS; and EXECUTION of the WRIT of DISTINGAS.

How treated of. **H**AVING stated, in former Chapters, the process by writs of *summons* and *distringas*, in ordinary cases^a, as well as against peers of the realm^b, and members of the House of Commons^b, and against corporations^c, and hundredors^c, and the writ of *capias*, and process of *outlawry*^d, with the *memoranda* and indorsements on the different writs^e, it is intended to treat, in the present Chapter, of the *service* of the writ of *summons*, and *execution* of the writ of *distringas*; and in the next, of the law of *arrest*, *affidavit* to hold to bail, and execution of the writ of *capias*.

Service of writ
of summons.
By whom.

Within the time limited for the service of the writ of *summons*, it should be personally served, if possible, on the defendant; and it may be served by the plaintiff or his attorney, who are authorized by the uniformity of process act^f, to return the same, or by any one else, who is competent to swear to the service: And every such writ may be served, in the manner heretofore used^g, in the county there-

Where.

^a *Ante*, 65, &c.

^b *Ante*, 81, &c.

^c *Ante*, 83.

^d *Ante*, 84, &c. 93, &c.

^e *Ante*, 96, &c.

^f 2 W. IV. c. 39. § 10.

^g For the manner of *summoning* the defendant, before the statute, in personal actions commenced by special *original writ*, in the King's Bench or Common Pleas, see Tidd *Prac.* 9 Ed. 109.; by *capias quare clausum fregit*, in the latter court, *id.* 111.; by *venire facias*, in the Exchequer of Pleas, *id.* 155.; on stat. 7 & 8 Geo. IV. c. 71. § 5. *id.* 113, 14. 155.; and in actions against peers, *id.* 118, 19, members of the House of Commons, *id.* 120, corporations, *id.* 121, hundredors, *id.* 123, and inhabitants of a county of a city, or liberty,

&c. *id.* 126: And as to the service of common process against the person, and by whom, when, where, and how it should be served, (which is probably the manner of service intended by the statute,) see *id.* 167, 8, 9. When the defendant resided in a county palatine, it was formerly holden, that he should be served with a copy of the *process* issuing out of the superior court, and not of the *mandate* from the officer to whom it was directed. *Griffith v. Allcock*, 2 Barnard. K. B. 327. 337. 398. *Byers v. Whitaker*, Pr. Reg. 344. *Barnes*, 406. S. C. *Griffin v. Higgin*, 1 Dowl. Rep. 45. 2 Leg. Obs. 125, 6. S. C. *per Taunton, J.* Tidd *Prac.* 9 Ed. 168. But it was afterwards decided, in the Common Pleas, that service of a writ directed to the chamberlain of the county palatine of Ches-

in mentioned, or within two hundred yards of the border thereof, and not elsewhere." ^a And where a district or place, being parcel of one county, is wholly situate within and surrounded by another, every such district and place shall and may, for the purpose of the service of such writ, be deemed and taken to be part as well of the county wherein it is so situate, as of the county whereof the same is parcel^b. But the court will not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order to save the statute of limitations; but the plaintiff must proceed according to the provisions of the above statute^c.

When the writ of *summons* is issued against a corporation aggregate, ^{How.} "it may be served on the mayor, or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation^d; and every such writ issued against the inhabitants of a *hundred*, or other like district, may be served on the high constable thereof, or any one of the high constables thereof^e; and every such writ, issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred or other like district, on some peace officer thereof." ^f In an action against two or more defendants, each of them must be served with a copy of the process^g: But, in an action against husband and wife, it is deemed sufficient to serve the husband only^h. The person serving the writ of *summons* is required by the actⁱ, to indorse on the writ, the day of the month and week of the service thereof: And, in order to give effect to this enactment, it is ordered, by a general rule of all the courts^j, that "the person serving a writ of *summons* shall, within three days at least after such service, indorse

Indorsement on writ, of day of service.

When to be made, and consequence of omission.

as, was irregular, without his mandate being issued to the sheriff. *Earl of Shrewsbury v. Haycraft*, 6 Bing, 194. 3 Moore & P. 471. S. C. And, in a subsequent case, it was determined by the court of King's Bench, that where a non-bailable writ of *latitat* issued into the county palatine of Lancaster, and a mandate thereupon was obtained from the Chancellor to the sheriff, service of either on the defendant was sufficient: *Ashbrook v. Townley*, 2 Barn. & Ad. 416.

^a Stat. 2 W. IV. c. 39. § 1.

^b *Id.* § 20.

^c *Frith v. Ld. Donegal*, 2 Dowl. Rep. 527. 8 Leg. Obs. 462. S. C.

^d § 18. For the manner of serving process, before the statute 2 W. IV. c. 39. in actions against corporations, see *Tidd Prac.* 9 Ed. 121; against *hundreds*, on stat. 7 & 8 Geo. IV. c. 81. § 4. *id.* 123; and against inhabitants of the county of a city, or liberty, &c., *id.* 126.

^e *Worley v. Bull*, Pr. Reg. 351.

^f *Buncombe v. Love and wife*, Barnes, 406. *Collins v. Shapland and wife*, *id.* 412. Pr. Reg. 351. S. C.

^g § 1. Sched. thereto, No. 1. Append. to *Tidd Sup.* 1833. p. 262.

^h R. M. 2 W. IV. reg. 3. 4 Barn. & Ad. 2. 9 Bing. 448, 4. 1 Crompt. & M. 2, 3.

on such writ, the day of the week and month of such service; otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant, according to the statute: and every *affidavit*, upon which such an appearance shall be entered, shall mention the day on which such indorsement was made." But where the defendant had improperly got possession of the writ of *summons*, the court allowed an appearance to be entered, without any indorsement on the writ, as required by the act, and ordered the defendant to pay the costs^a. And where the writ was irregular, but the service was regular, and the defendant moved to set aside the service for irregularity, the court discharged the rule^b.

Setting aside proceedings, for want of personal service.

If the defendant has not been personally served with a copy of the writ of *summons*, as where it has been served, by mistake, on a wrong person, &c. the court, on motion, will set aside the proceedings. But where a personal service has been sworn to, the court will not interfere, upon motion, to set it aside, however positively the defendant, and other persons, may swear to negative the personal service, if it be left in doubt, by the *affidavits* on the other side, whether there was a sufficient service or not^c. If a defendant seek to set aside proceedings, on the ground of not having been served with process, it must appear, by his *affidavit*, that he is the defendant in the cause^d: And it is not a sufficient ground for setting them aside, that the service of the writ was not made directly and personally upon the defendant, and especially after a positive *affidavit* of personal service on the plaintiff's part; but the defendant must go on further to shew, that neither the writ, nor copy, came to his knowledge or possession^e: If such circumstances be shewn, as satisfy the court that process has come to the possession of the defendant, that is deemed a sufficient personal service^f. And the court will not set aside proceedings, on an *affidavit* of the defendant, that he had not been personally served, accompanied by an *affidavit* of his daughter, that she received and opened a letter containing the copy of the writ^g.

^a Brook v. Edridge, 2 Dowl. Rep. 647.

^b Hasker v. Jarman, 1 Crompt. & M. 408. 3 Tyr. Rep. 381. Anon. 1 Dowl. Rep. 654. S. C. and see Cohen v. Watson, 3 Tyr. Rep. 238.

^c Morris v. Coles, 2 Dowl. Rep. 79. 6 Leg. Obs. 315. S. C.

^d Johnson v. Smallwood, 2 Dowl. Rep. 368. 9 Leg. Obs. 61, 2. S. C.; and see France v. Wright, 3 Dowl. Rep. 325. 9

Leg. Obs. 347, 8. S. C. per Patteson, J.

^e Phillips v. Ensell, 2 Dowl. Rep. 684. 1 Crompt. M. & R. 374. 4 Tyr. Rep. 814. S. C.

^f Williams v. Figgott, 1 Meeson & W. 574.; and see Rhodes v. Innes, 7 Bing. 329. 5 Moore & P. 153. 1 Dowl. Rep. 215. S. C.

^g Herbert v. Darley, 4 Dowl. Rep. 726. 12 Leg. Obs. 195. S. C.

The writ of *distringas* being issued, should, by the uniformity of process act^a, be delivered, with the notice subscribed thereto, and a copy thereof, to the sheriff or other officer to whom it is directed^a; and he will grant a *warrant*^b thereon, for the execution of it: but, in the county palatine of *Lancaster*, a *mandate*^c must be previously obtained from the Chancellor of the Duchy, or his deputy, commanding the sheriff to execute the writ. The sheriff having received the writ, and granted a warrant thereon, it is his duty, before the return thereof, to distrain upon the goods of the defendant, if he has any, for the sum of 40s. in order to compel his appearance; and also to serve the writ and notice, or a copy thereof, on the defendant, if he can be met with; or if not, to leave it for him, at the place where the *distringas* was executed^d. If the writ cannot be executed, the sheriff should return *non est inventus*, and *nulla bona*; and thereupon, if the defendant do not appear within *eight* days inclusive after the return of the writ, the plaintiff may either apply to the court, on a proper *affidavit*, to enter an appearance for him^e, or proceed to outlawry^f.

Delivery of
distringas, &c.
to sheriff, &c.

Warrant, or
mandate, there-
on.

Duty of sheriff,
in executing
writ.

If writ cannot be
executed.

^a 2 W. IV. c. 39. § 3.

^b Append. to Tidd *Sup.* 1833. p. 270.;
and as to the sheriff's warrant, see Tidd
Prac. 9 Ed. 216, 17.

^c Append. to Tidd *Sup.* 1833. p. 270.

^d Stat. 2 W. IV. c. 39. § 3. and see

Tidd *Prac.* 9 Ed. 114. as to the mode of
serving the writ of *distringas*, on stat. 7 &
8 Geo. IV. c. 71. § 5.

^e *Post*, Chap. XII.

^f *Ante*, 80. 93.

CHAP. X.

Of the LAW of ARREST; AFFIDAVIT to hold to BAIL; and EXECUTION of the WRIT of CAPIAS.

IN the present Chapter, it is proposed to consider, first, what persons may, or may not be arrested, and held to special bail; secondly, for what cause of action an arrest is allowed; thirdly, the recent rules of court, and decisions on the *affidavit* to hold to bail, particularly on bills of exchange, and promissory notes, &c.; and fourthly, the execution of the writ of *capias*.

Writ of *capias*,
when it lies.

It has been already observed^a, that the writ of *capias* lies in all cases where the plaintiff has aailable cause of action, and against all persons who are not exempted, or privileged from arrest: but there is a *proviso* in the uniformity of process act^b, that “nothing therein contained shall subject any person to arrest, who, by reason of “any privilege, usage, or otherwise, may now by law be exempt “therefrom.” The persons against whom a writ of *capias* does not lie, and who cannot therefore be arrested and held to special bail, are (not to mention the *King* and *Queen*) *ambassadors*, or other public ministers; *peers* of the realm of *England*, and *peeresses*, whether by birth or marriage; *Scotch*, or *Irish*, *peers* and *peeresses*; members of the house of *commons*, or of *convocation*; members of *corporations* aggregate, for any thing done in their corporate capacity; *hundredors*, on the statute 7 & 8 Geo. IV. c. 31; and *attornies*, when privileged from arrest, or *officers* of courts of justice^c. There are also other persons, who, though subject to a writ of *capias*, are not liable to be arrested thereon; as the servants in ordinary of the *King* or *Queen* regent, without notice first given to, and leave obtained from the lord chamberlain of the royal household^d; *executors* and *administrators*, when they merely act *en auter droit*, and have duly administered the effects of the deceased^e; *heirs*

Persons not sub-
ject thereto.

Persons not
liable to be ar-
rested thereon.

^a *Ante*, 84.

^d *Id.* 190.

^b 2 W. IV. c. 39. § 19.

^e *Id.* 193.

^c *Tidd Prac.* 9 Ed. 191, 2, 3.

and *devisees*, when sued on the bond or obligation of their ancestors, or devisors^a; *married women*, for debts contracted before or after coverture^b, unless, in the latter case, they have appeared and acted as *femes sole*, and obtained credit in that character, under false and fraudulent pretences^b; *seamen*^c, *marines*^c, and *soldiers*^c, for debts under a certain amount^d; *bankrupts*, in coming to surrender, and finish their examination^e, and, after they have obtained their certificates, for debts contracted prior to their bankruptcy^f; and *insolvent debtors*, discharged under the statute 7 Geo. IV. c. 57, for debts due at the time of filing their petitions^g. It is also observable, that defendants have, in some cases, only a *temporary* or *local* privilege from arrest: Thus, the *parties* to a suit, and their *attornies*, *witnesses*, &c. are, for the sake of public justice, privileged from arrest, in coming to, attending upon, and returning from the courts; or, as it is usually termed, *eundo*, *morando*, *et redeundo*^h: and it has been determined, that a practising barrister is so privileged; and that he does not lose his privilege, by going into a shop, on his return from court, unless he remain there an unreasonable timeⁱ. *Clergymen* also are privileged, in going to and returning from church, or performing divine service^k: And every person is privileged from arrest on *Sunday*, except in cases of treason, felony, or breach of the peace^l; and in his own house, provided the outer door be shut^m; or in the King's presence^m; or within the verge of his royal palace^m, except by an order from the board of green cloth, or unless the process issue out of the *palace* court^m; or in any place where the King's justices are actually sitting^m.

Persons having a temporary, or local privilege from arrest.

^a Tidd *Prac.* 9 Ed. 193.

^b *Id.* 194, 5.

^c *Id.* 198, 9.

^d By the statute 32 Geo. III. c. 33. *petty officers* and *seamen* in his majesty's service, were privileged from arrest, for any sum under 20*l*. And, by the last annual *mutiny* act, (6 & 7 W. IV. c. 8.) § 3. no person enlisted as a *soldier* shall be liable to be taken out of his majesty's service, by any process or execution, other than for some criminal matter, unless an *affidavit* be made, that the original debt amounts to the value of *thirty* pounds at least, over and above all costs of suit: And there is a similar clause, with regard

to persons enlisted into his majesty's service as *marines*, in the last annual *marine* act, (6 & 7 W. IV. c. 9.) § 3.

^e Tidd *Prac.* 9 Ed. 200.

^f *Id.* 204.

^g *Id.* 213.

^h *Id.* 195.

ⁱ *Luntly v. Nathaniel*, 2 Dowl. Rep. 51. 1 Crompt. & M. 579. 3 Nev. & M. 213. (b.) S. C. and see *Pitt v. Coombs*, 3 Nev. & M. 212. 5 Barn. & Ad. 1076. S. C.

^k Tidd *Prac.* 9 Ed. 219. *Post*, 127.

^l *Id.* 218.

^m *Id.* 219.

Arrest, when allowed in general, and for what sum.

General control over plaintiff's right to hold to bail.

When the cause of action amounts to *twenty* pounds, or upwards, and an *affidavit* is made thereof, and filed according to the statutes, the process is *bailable*; and the defendant may in general be arrested, and holden to special bail: But where the plaintiff, having a debt due to him under an arrestable sum, procured a promissory note to be indorsed to him by another creditor, for the purpose of holding the defendant to special bail, the court, considering this as a practice to evade the statute, discharged the defendant out of custody, on filing common bail^a. And in general it appears, that the courts have always exercised, and have the power to exercise, a general controul over the right of the plaintiff to hold to bail^b. Before the statute 12 Geo. I. c. 29, the power of arresting depended on the *practice* of the courts only, modified from time to time by *rules* of the courts for that purpose: Thus, the practice of not allowing a *second* arrest for the *same* cause of action; of not allowing an arrest, when the original debt was less than *ten* pounds, but raised up to that sum by the costs of the former action; of allowing the plaintiff to hold to bail in actions of *trover*, and *trespass*, had no other foundation than the *rules* of the courts; and the statute above referred to took away no authority which the courts antecedently possessed, except that it prevented the issuing of *bailable* process for a smaller sum than *ten* pounds. The courts, therefore, may still interpose; and accordingly, in various cases, have interposed, in a summary way, and have discharged the defendant on common bail^c. Thus, the court of King's Bench, in one case^d, discharged a defendant out of custody, on the ground that the giving of a new security by the plaintiff to a creditor of the defendant, could not be considered as money paid to the defendant's use, upon which ground alone he had been held to bail; and in another case^e, they discharged the defendant, where it appeared, from the plaintiff's own letters, that the defendant was his creditor in a considerable sum; And, in a subsequent case^f, the principle that such excepted cases may exist, in which the court may interpose, by their summary jurisdiction, and discharge the defendant, was fully admitted by the court. So, in the Common Pleas, where the plaintiff had commenced an action on the protho-

^a Wigglesworth v. Isherwood, 1 Ken. 371.

^b Chambers v. Bernasconi, 6 Bing. 498. 500. 4 Moore & P. 218. 220. S. C.

^c *Id. ib.*

^d Taylor v. Higgins, 3 East, 169.

^e Nizetich v. Bonacich, 5 Barn. & Ald. 904. and see Jackson v. Tomkins, 2 Chit. R. 20.

^f M'Ginnis v. M'Curling, 6 Dowl. & R. 24.

notary's *allocatur* for costs, and had arrested the defendant, this court, though they would not stay the proceedings, held the arrest to be bad^a. So, in the Exchequer, if there be probable ground to suspect that the securities upon which the defendant is held to bail are illegal, the court, it is said, will discharge him, upon filing common bail^b. And where a plaintiff, after making an affidavit of debt, received part of it, and the debt was thereby reduced to an amount insufficient to warrant an arrest, and the defendant was, notwithstanding, afterwards arrested for the whole debt, the court ordered the bail bond to be set aside, with costs^c. But the courts will not set aside an arrest upon the merits, unless it be clear, from the affidavits, that the plaintiff could not have had any cause of action^d, the circumstance of the action being brought for purposes of intimidation, would not, it seems, be a ground for such interference^d: And the court refused to set aside a *capias*, and discharge a defendant out of custody, on the ground that he had been arrested for a debt, which the plaintiff, by the particulars of his demand, had shewn to have been contracted upwards of *six* years before the commencement of the action^e. So, the court refused to interfere summarily, to discharge a defendant out of custody, on the ground that the arrest was against good faith, in being made for the whole debt, after an engagement to receive the amount by instalments^f. And they would not discharge a defendant out of custody, in an action on a promissory note, on an affidavit being produced, shewing that the consideration for the note was a gambling debt, and that an injunction had issued in the court of Chancery, to stay proceedings at law^g. It is said to be only in extreme cases, that the court will interfere, and where it can be shewn that the process of the court has been abused^h.

^a Fry v. Malcolm, 4 Taunt. 705. and see Echlin v. Hartop, 2 Blac. Rep. 896. Sumner v. Green, 1 H. Blac. 301. Hamilton v. Pitt, 7 Bing. 230.

^b Wightwick v. Banks, Forrest, 153. and see M'Clure v. Pringle, 13 Price, 8. M'Clel. 2. S. C.; but see Isaacs v. Silver, 11 Moore, 348. where it is said by the court, that the case in *Forrest* cannot be supported.

^c Short v. Cunningham, 1 Dowl. Rep. 662.

^d Burton v. Haworth, 1 Nev. & M. 318. 4 Barn. & Ad. 462. S. C. Tucker

v. Tucker, 1 Scott, 463. Mason v. Smith, 5 Dowl. Rep. 179. 12 Leg. Obs. 421, 2. S. C.

^e Potter v. Macdonel, 3 Dowl. Rep. 583. 10 Leg. Obs. 110, 11. Pottier v. Macdonell, 1 Har. & W. 189. S. C.

^f Udall v. Nelson, 1 Har. & W. 177. 4 Nev. & M. 637. 3 Ad. & E. 215. S. C.

^g Curzon v. Hodges, 5 Dowl. Rep. 98. 12 Leg. Obs. 101. S. C.

^h Mason v. Smith, 5 Dowl. Rep. 179. 12 Leg. Obs. 421, 2. S. C.

Second arrest,
after *non pros*,
&c.

The defendant having been once arrested, cannot in general be arrested again, for the *same* cause of action ^a: *Nemo debet bis vexari, pro eadem causa*. This rule was formerly so rigidly adhered to, that where the plaintiff was *nonprossed* for want of a declaration, he could not afterwards have arrested the defendant, in a second action, for the same cause ^b: and the same practice still prevailed in the Common Pleas ^c: but, in the King's Bench, it was determined, that after a *non pros*, the defendant should find bail in the second action ^d; for the plaintiff, it was said, suffered enough by paying costs in the first action, and therefore ought not to be in a worse situation than before. So, if the plaintiff were *nonsuited*, in an action of *debt* on bond, for not sufficiently proving the execution of it on *non est factum* ^e, or on the ground of a variance in a former action, in which the defendant was arrested ^f, he might formerly have been arrested again, in a second action, for the same cause; but this was not allowed after a nonsuit on the merits ^g: and where the plaintiff, having misconceived his action, moved to *discontinue* upon payment of costs, he might, after the costs were taxed and paid ^h, have taken out a new writ for the same cause, and had the defendant arrested *de novo* ⁱ. But now, by a general rule of all the courts ^k, "after *non pros*, nonsuit, or discontinuance, the defendant shall not be arrested a second time, without the order of a judge." It is not irregular, however, for a plaintiff to issue several serviceable writs, and afterwards proceed to arrest the defendant on bailable process, without discontinuing the previous writs ^l: And notice of discontinuance of a bailable action is not necessary, previously to a second arrest, pursuant to a judge's order ^m.

Not allowed
without judge's
order.

^a R. M. 15 Car. II. reg. 2. K. B. and see Tidd *Prac.* 9 Ed. 174.

^b *Almanson v. Davila*, 1 Ld. Raym. 679. Com. Rep. 94. S. C.

^c *Archer v. Champneys*, 3 Moore, 607. 1 Brod. & B. 289. S. C. *Williams v. Thacker*, 4 Moore, 294. 1 Brod. & B. 514. S. C.

^d *Turton v. Hayes*, 1 Str. 439.

^e *Harris v. Roberts*, Barnes, 73.

^f *Kearney v. King*, 1 Chit. R. 273.

^g *Anon. per Cur. E.* 19 Geo. III. K. B.

^h *Belifante v. Levy*, 2 Str. 1209. *Molling v. Buckholtz*, 3 Maule & S. 153. *White v. Gompertz*, 5 Barn. & Ald. 905.

1 Dowl. & R. 556. S. C. *Claughton v. Farquharson*, 7 Moore, 312.

ⁱ *Bates v. Barry*, 2 Wils. 381. *Keeling v. Elliott*, Barnes, 399. and see Tidd *Prac.* 9 Ed. 175.

^k R. H. 2 W. IV. reg. I. § 7. 3 Barn. & Ad. 375. 8 Bing. 289. 2 Crompt. & J. 169.

^l *Chapman v. Vandevelde*, 3 Dowl. Rep. 313. 9 Leg. Obs. 300. S. C. *per Littledale, J.* and see *Ryves v. Bunning*, 3 Dowl. Rep. 817. 10 Leg. Obs. 334, 5. S. C. Tidd *Prac.* 9 Ed. 174, 5.

^m *Price v. Day*, 3 Dowl. Rep. 463. 1 Crompt. M. & R. 937. 5 Tyr. Rep. 456. 9 Leg. Obs. 430. S. C.

In the King's Bench, by an old rule of court^a, "the true place of abode, and the true addition of every person making an *affidavit* in this court, shall be inserted in such affidavit:" But there being no such rule in the Common Pleas^b, it was ordered, by a general rule of all the courts^c, that "the addition of every person making an affidavit, shall be inserted therein:" which rules, it has been holden, extend to an affidavit made by the *defendant* in a cause, as well as by other persons^d. And where, in an affidavit to found a motion, the addition of a deponent is omitted, the court will not enquire whether the facts sworn to by a deponent, are sufficient to support the application^e. Where a deponent described himself as an *assessor*, it was deemed insufficient^f; and his being described as "*clerk* to the defendant's attorney," is not sufficient, without stating his residence^g. But where the party making the affidavit was described as of *Kennington*, in the county of *Surrey*^h, or of "*Lawrence Pountney*, in the city of *London*;"ⁱ without stating whether parish, place, or lane, it was holden to be a sufficient description of his residence. So, an affidavit of debt, in which the deponent described himself as "*late of Tyrone*, in the county of *Tyrone*, in *Ireland*, but now in *Dublin Castle*," was deemed sufficient^k. And the court will not try the real place of the party's abode, upon affidavits^l.

Affidavit must contain deponent's addition.

It was determined in one case^m, to be no objection to an affidavit to hold to bail, that it was not entitled "In the King's Bench": In a

Title of.

^a R. M. 15 Car. II. reg. 1. K. B.
^b Anon. 6 Taunt. 73. and see Tidd *Prac.* 9 Ed. 179. 493.
^c R. H. 2 W. IV. reg. I. § 5. 3 Barn. & Ad. 375. 6 Bing. 289. 2 Crompt. & J. 169.
^d Lawson v. Case, 1 Crompt. & M. 481. 3 Tyr. Rep. 489. 2 Dowl. Rep. 40. 6 Leg. Obs. 125. S. C.; but see Poole v. Pembrey, 1 Dowl. Rep. 693. 3 Tyr. Rep. 387. S. C. per Bayley, B. Jackson v. Chard, 2 Dowl. Rep. 469. 7 Leg. Obs. 388. S. C. per Parke, J. Jervis v. Jones, 4 Dowl. Rep. 610. 1 Har. & W. 654. 11 Leg. Obs. 405, 6. S. C. *semb. contra*; and see Anon. 6 Taunt. 73. 1 Dowl. Rep. 693, 4. (b.) Creed v. Coles, 7 Leg. Obs. 525. Sharp v. Johnston, 2 Scott, 407. 2 Bing. N.R. 246. 1 Hodges, 298. 4 Dowl. Rep. 824. S. C. Smith's Bail, 13 Leg. Obs. 44, 5.
^e Rex v. Justices of Carnarvon, 5 Nev.

& M. 364.
^f Nathan v. Cohen, 1 Har. & W. 107. 3 Dowl. Rep. 370. S. C.
^g Daniels v. May, 5 Dowl. Rep. 83. 12 Leg. Obs. 46. S. C. but see Simpson v. Drummond, 2 Dowl. Rep. 473. 8 Leg. Obs. 301, 2. S. C. per Parke, J. and see Bottomley v. Belchamber, 1 Har. & W. 362. 4 Dowl. Rep. 26. 10 Leg. Obs. 507, 8. S. C.
^h Wilton v. Chambers, 1 Har. & W. 116. per Patteson, J. and see Hunt's bail, 4 Dowl. Rep. 272. 1 Har. & W. 520.
ⁱ Leg. Obs. 45. S. C. per Littledale, J.
^j Miller v. Miller, 2 Scott, 117.
^k Stuart v. Gaveran, 1 Har. & W. 699.
^l Anon. per Cur. H. 45 Geo. III. K. B. 2 Smith R. 207. S. C. Anon. 2 Leg. Obs. 382. per Patteson, J.
^m Kennet and Avon Canal Company v. Jones, 7 Durnf. & E. 451.

subsequent case, however, it was holden, that an affidavit of debt not entitled in any court, and only subscribed with the words "By the Court", at the bottom of the *jurat*, was not sufficient^a. But it is now settled, by a general rule of all the courts^b, that "an affidavit sworn before a judge of any of the courts of King's Bench, Common Pleas, or Exchequer, shall be received in the court to which such judge belongs, though not entitled of that court; but not in any other court, unless entitled of the court in which it is to be used."

General requisites of.

The general requisites of an *affidavit* to hold to bail, are first, that it should be *direct* and *positive*, that the plaintiff has a subsisting cause of action: secondly, that it should be *certain* and *explicit*, as to the nature of the cause of action: and thirdly, that it should be *single*, and not contain two or more different causes of complaint that cannot be joined in the same action, either at the suit of one or several plaintiffs, or against one or several defendants^c.

In action on bill or note, what must in general, or need not, be stated in.

It does not seem to have been formerly necessary, in an affidavit to hold to bail on a *bill of exchange*, or *promissory note*, to express the sum for which the bill or note was drawn^d: but it is now settled, that in such an affidavit, the sum for which the bill or note was drawn must be specified^e. In an affidavit to hold to bail for principal and interest due on a bill of exchange, the amount of the bill must be stated^f; and it has been holden, that the affidavit must shew how much is due for each, and that the amount due for principal is large enough to warrant an arrest^g: But the judges have expressed an

^a Molling v. Poland, 3 Maule & S. 157. and see Tidd Prac. 9 Ed. 180, 81. 492. 494, 5.

^b R. H. 2 W. IV. reg. I. § 4. 3 Barn. & Ad. 375. 8 Bing. 288. 2 Crompt. & J. 168.

^c For these requisites, and the cases decided thereon, see Tidd Prac. 9 Ed. 182, &c.

^d Bennett v. Dawson, 1 Moore & P. 594. 4 Bing. 609. S. C. Anon. 3 Leg. Obs. 46. Hanley v. Morgan, 2 Crompt. & J. 331. 1 Dowl. Rep. 322. S. C. Lewis v. Gompertz, 2 Crompt. & J. 352. 2 Tyr. Rep. 317. 1 Dowl. Rep. 319. S. C. Chit. on Bills, 8 Ed. 573. Byles on Bills, 2 Ed. 227.

^e Brooke v. Coleman, 1 Crompt. & M. 621. 3 Tyr. Rep. 593. 2 Dowl. Rep.

7. 6 Leg. Obs. 444. S. C. Raggett v. Guy, 3 Dowl. Rep. 554. 10 Leg. Obs. 108. Rackett v. Gye, 1 Har. & W. 198. S. C. Molineux v. Dorman, 3 Dowl. Rep. 662. Molyneux v. Doreman, 10 Leg. Obs. 78. S. C. Reddell (or Riddell) v. Pakeman, 3 Dowl. Rep. 714. 1 Gale, 104. 2 Crompt. M. & R. 30. 5 Tyr. Rep. 721. S. C.; and see Anon. 5 Leg. Obs. 95. Westmacott v. Cook, 2 Dowl. Rep. 519. 8 Leg. Obs. 479. S. C. Chit. Jun. on Bills, 73. (h.) and Addend. thereto.

^f Brown v. Jackson, 9 Leg. Obs. 108.

^g Latraille v. Hoepfner, 10 Bing. 334. 3 Moore & S. 800. 2 Dowl. Rep. 758. S. C. and see Anon. 3 Leg. Obs. 46. Callum v. Leeson, 2 Crompt. & M. 406. 4 Tyr. Rep. 266. 2 Dowl. Rep. 381; S. C.

opinion, that where a claim is made for principal and interest on a bill, and a date is mentioned from which interest can be computed, it is sufficient^a; and the affidavit need not state the contract by which the interest became due^b. Where a bill or note is payable by *instalments*, the affidavit should shew what instalments are due; and it will not be sufficient to state that the sum for which the bill or note was given, has not been paid^c. The affidavit must also state the time when the bill or note was payable; or that it is overdue, or was payable at a day then past^d: But it need not set forth the date of the bill^e. And an affidavit stating that the defendant was indebted to the plaintiff in a certain sum, upon the *balance* of a bill of exchange, drawn by the plaintiff upon and accepted by the defendant, and due at a day past, is sufficient^f. So, if it state the defendant to be indebted to the plaintiff, on a bill which was payable at a day past, without alleging that the bill was unpaid or dishonoured, it seems to be sufficient^g.

The affidavit must also shew in what character the *defendant* became liable to the payment of the bill or note, whether as drawer, acceptor, or indorser^h; for otherwise he might not be liable on the bill, but merely as a guarantee, in which case the nature of his engagement must be stated^h. But it is not necessary for the affidavit

Character of parties.

^a Rogers v. Godbold, 3 Dowl. Rep. 106. Brown v. Jackson, 9 Leg. Obs. 108. and see Hutchinson v. Hargrave, 1 Scott, 269. 1 Bing. N. R. 369. S. C.

^b Pickman v. Collis, 1 Gale, 47. 3 Dowl. Rep. 429. 9 Leg. Obs. 332. S. C. White v. Sowerby, 3 Dowl. Rep. 584. 1 Har. & W. 218. 10 Leg. Obs. 77. S. C. but see Drake v. Harding, 1 Har. & W. 364. 4 Dowl. Rep. 34. 10 Leg. Obs. 220, 21. S. C.

^c Hart v. Myerria, 3 Tyr. Rep. 238. and see Roberts v. Pilkington, 7 Leg. Obs. 388.

^d Perks v. Severn, 7 East, 194. Jackson v. Yate, 2 Maule & S. 148. Holcombe v. Lambkin, *id.* 475. Edwards v. Dick, 3 Barn. & Ald. 495. Machu v. Fraser, 7 Taunt. 171. 2 Marsh. 483. S. C. Sands v. Graham, 4 Moore, 18. Lamb v. Newcomb, 5 Moore, 14. 2 Brod. & B. 348. S. C. Warmesley v. Macey, 5 Moore, 52. 2 Brod. & B. 338. S. C. Olney v. Bowles, 2 Leg. Obs. 108. Kirk

v. Almond, 2 Crompt. & J. 354. 2 Tyr. Rep. 316. 1 Dowl. Rep. 318. S. C. 3 Man. & R. 131, 2. *in notis.* Shirley v. Jacobs, 1 Scott, 67. 3 Dowl. Rep. 101. 9 Leg. Obs. 76, 7. S. C.; but see Davison v. March, 1 New Rep. C. P. 157. *contra.*

^e Anon. 3 Leg. Obs. 46. *per Little-dale*, J. Irving v. Heaton, 2 Scott, 796. 4 Dowl. Rep. 638. 1 Hodges, 430. 11 Leg. Obs. 308. S. C.

^f Walmsley v. Dibdin, 4 Moore & P. 10.

^g Phillips v. Turner, 1 Crompt. M. & R. 597. 5 Tyr. Rep. 196. 3 Dowl. Rep. 163. 9 Leg. Obs. 110. S. C. *per Gurney*, B.; and see Masters v. Billing, 3 Dowl. Rep. 751. 10 Leg. Obs. 254. S. C.

^h Humphries v. Winslow (*or Williams*), 6 Taunt. 531. 2 Marsh. 231. S. C. M'Taggart v. Ellice, 12 Moore, 326. 4 Bing. 114. S. C. Chit. Bills, 8 Ed. 573, 4. 4 Moore & S. 357. (c.)

to specify in what particular character the debt is due to the *plaintiff*, whether as payee or indorsee ^a; for if he had no interest in the bill, on which he could sue the defendant, he would be guilty of perjury, and liable to an action for maliciously holding the defendant to bail ^a. An affidavit, therefore, to hold to bail, stating that the defendant was indebted to the plaintiff on a bill of exchange, payable to a third person, at a day now past, was deemed sufficient, without stating at what day the bill was payable, or shewing the connexion between the payee and the plaintiff ^b. But an affidavit, stating that *A. B. and C.* were jointly indebted to the plaintiff, on a bill of exchange accepted in the name and firm of *A. and Co.* by the said *A., B. and C., or one of them*, is insufficient ^c.

In action by indorsee of bill, or note.

An affidavit to hold to bail for a sum due to plaintiff, as indorsee of a bill of exchange, must state by whom the bill was indorsed; stating that it was *duly* indorsed to the plaintiff, is not sufficient ^d. But it is not necessary to state that the bill was negotiable, or payable to order ^e; and intermediate indorsements need not, it seems, be stated ^f. The affidavit to hold to bail, in an action by the payee or indorsee of a bill of exchange against the drawer, or by the indorsee of a promissory note against the payee or indorser, must shew the presentment to, and default of the acceptor of the bill, or drawer of the note ^g;

^a Bradshaw v. Saddington, 7 East, 94.
3 Smith R. 117. S. C. and see Machu v. Fraser, 7 Taunt. 171. 2 Marsh. 483. S. C. Lamb v. Newcombe, 5 Moore, 14. 2 Brod. & B. 343. S. C. Chit. Bills, 8 Ed. 574. Chit. Jun. on Bills, 73. (i.) and Addend. thereto; but see Balbi v. Batley, 6 Taunt. 25. 1 Marsh. 424. S. C. Mammatt v. Mathew, 4 Moore & S. 356. 10 Bing. 506. S. C. *semb. contra*.

^b Elstone v. Mortlake, 1 Chit. R. 648. and see Brooks v. Clark, 2 Dowl. & R. 148. Walmealey v. Dibdin, 4 Moore & P. 10.

^c Harmer v. Ashby, 10 Moore, 323.

^d Lewis v. Gompertz, 2 Crompt. & J. 352. 2 Tyr. Rep. 317. 1 Dowl. Rep. 319. S. C. Woolley v. Escudier, 2 Moore & S. 392. McTaggart v. Ellice, 12 Moore, 326. 4 Bing. 114. S. C. Firley v. Rallett, 2 Dowl. Rep. 708. *per Parke*, B. Fownes v. Stokes, 4 Dowl. Rep. 125. 2 Scott, 205. S. C.; but see

Mammatt v. Mathew, 4 Moore & S. 356. 10 Bing. 506. S. C. *semb. contra*.

^e Hughes v. Brett, 3 Moore & P. 566. 6 Bing. 239. S. C.

^f 1 Chit. Jun. on Bills, 74. (t.) and Addend. thereto. And for the forms of affidavits to hold to bail, on promissory notes, and bills of exchange, see Append. to Tidd Prac. 9 Ed. 79.

^g Buckworth v. Levi, 5 Moore & P. 23. 7 Bing. 251. 1 Dowl. Rep. 211. S. C. Cross v. Morgan, *id.* 122. 3 Leg. Obs. 97. S. C. Banting v. Jadis, 1 Dowl. Rep. 445. 4 Leg. Obs. 317. S. C. Smith v. Escudier, 3 Tyr. Rep. 219. Crosby v. Clark, 1 Meeson & W. 296. 1 Tyr. & G. 660. 5 Dowl. Rep. 62. S. C.; and see Tucker v. Colegate, 2 Tyr. Rep. 496. 2 Crompt. & J. 489. 1 Dowl. Rep. 574. S. C. Simpson v. Dick, 3 Dowl. Rep. 731. 10 Leg. Obs. 239. S. C. Irving v. Heaton, 2 Scott, 798. 1 Hodges, 430. 4 Dowl. Rep. 638. 11

and if there has been no presentment, but it has been dispensed with, or the acceptor or drawer could not be found, the special facts must be stated in the affidavit^a. But in an action by the indorsee of a bill of exchange, against the acceptor, the affidavit need not allege a presentment for payment^b. So, in an action against the drawer of a bill of exchange, or indorser of a promissory note, notice to the defendant of its being dishonoured, need not, it seems, be stated in the affidavit^c. Where an affidavit to hold to bail on three promissory notes, was defective as to two of them, the court of Exchequer discharged the defendant, on filing common bail; and would not order bail to be taken to the amount of the note, as to which the affidavit was sufficient^d.

When defective, as to one or more of several notes.

It was formerly holden, in the Common Pleas, that in an affidavit of debt, for money paid to the use of the defendant^e, or for work and labour as the defendant's servant^f, it was not necessary to state that it was at his request; but it was otherwise in the King's Bench^g, and Exchequer^h: And now, by a general rule of all the courtsⁱ, "affidavits to hold to bail, for money paid to the use of the defendant, or for work and labour done, shall not be deemed sufficient, unless they state the money to have been paid, or the work and labour to have been done, at the request of the defendant." So, in an affidavit of debt, for the agistment of cattle, it must be stated, that the agistment was at the defendant's request^k: And an affidavit of debt

Affidavit for money paid, &c.

Leg. Obs. 308. S. C.; but see *Weedon v. Medley*, 2 Dowl. Rep. 689. 9 Leg. Obs. 44. S. C. *Witham v. Gompertz*, 1 Tyr. & G. 6. 4 Dowl. Rep. 382. 1 Gale, 301. 2 Crompt. M. & R. 736. S. C. *contra*.

^a 1 Chit. Jun. on Bills, 73, 4. (q.)

^b *Usborne v. Pennell*, 4 Moore & S. 431. and see *Phillips v. Turner*, 1 Crompt. M. & R. 597. 3 Dowl. Rep. 163. 5 Tyr. Rep. 196. 9 Leg. Obs. 110. S. C.

^c 1 Chit. Jun. on Bills, 73. (q.)

^d *Kirk v. Almond*, 2 Crompt. & J. 354. 2 Tyr. Rep. 316. 1 Dowl. Rep. 318. S. C.; and see *Baker v. Wills*, 1 Crompt. & M. 238. 3 Tyr. Rep. 182. 1 Dowl. Rep. 631. S. C. *Raggett v. Guy*, 3 Dowl. Rep. 554. 10 Leg. Obs. 108. *Rackett v. Gye*, 1 Har. & W. 198. S. C. *Drake v. Harding*, 4 Dowl. Rep. 34. 1 Har. & W. 364. 10 Leg. Obs. 220, 21.

S. C.

^e *Eyre v. Hulton*, 5 Taunt. 704. *Symonds v. Andrews*, *id.* 751. *Hulton v. Eyre*, 1 Marsh, 315. *Berry v. Fernandez*, 8 Moore, 332. 1 Bing. 338. S. C.

^f *Bliss v. Atkins*, 5 Taunt. 756. 1 Marsh. 317. (a.) S. C. *Brown v. Garnier*, 6 Taunt. 389. and see *Rowley v. Bayley*, 11 Moore, 383.

^g *Durnford v. Messiter*, 5 Maule & S. 446. *Pitt v. New*, 8 Barn. & C. 654. 3 Man. & R. 129. S. C. and see *Tidd Prac.* 9 Ed. 184.

^h *Reeves v. Hucker*, 1 Price, N.R. 137. 2 Crompt. & J. 44. 2 Tyr. Rep. 161. S. C.

ⁱ R. H. 2 W. IV. reg. I. § 8. 3 Barn. & Ad. 375. 8 Bing. 289. 2 Crompt. & J. 170.

^k *Smith v. Heap*, 5 Dowl. Rep. 11. 12 Leg. Obs. 211. S. C.

or interest.

"for money had and received by the defendant, for and on account of the plaintiff, and at his request," instead of "to and for the use of the plaintiff," is not sufficient^a. An affidavit to hold to bail, stating that the defendant is indebted to the plaintiff in 1000*l*. "*on balance of account, for money paid, laid out and expended by the plaintiff, to and for the defendant, and at his request, and for money had and received by the defendant for the plaintiff, and for interest of monies due by the defendant to the plaintiff,*" is not sufficiently certain^b. So, an affidavit of debt, for money paid and *interest*, without shewing how the interest accrued, is bad^c: the affidavit ought to state it to be due upon an *agreement*^d. But an affidavit to hold to bail for 50*l*. due for money paid and expended to the use of the defendant, and at his request, and for interest *agreed* to be paid thereon, has been deemed sufficient^e.

Before whom sworn.

The affidavit of the cause of action may be sworn in court, or before a judge, or commissioner of the court, authorized to take affidavits, by virtue of the statute 29 Car. II. c. 5. or else before the officer who issues the process, or his deputy^f: and it may be sworn before a commissioner, although he be concerned as attorney for the plaintiff^g.

Supplemental affidavit.

In the King's Bench, it is the constant and uniform practice of the court, not to receive a *supplemental* affidavit to hold to bail^h. In the Common Pleas however, where the affidavit to hold to bail was defective, by reason of the omission of some circumstance necessary to complete it, as where it was not sworn, in an affidavit made by an *executor*, that he believed the debt to be dueⁱ, or that the defendant acknowledged an account stated^k, &c. the court would formerly have permitted the deficiency to be supplied by a *supplemental* affidavit. But now, by a general rule of all the courts^l, "no *supplemental* affi-

^a Kelly v. Curzon, 1 Har. & W. 678. but see Coppinger v. Beaton, 8 Durnf. & E. 388. *semb. contra*.

^b Visger v. Delegal, 2 Barn. & Ad. 571. 1 Dowl. Rep. 333. S. C.

^c Callum v. Leeson, 2 Dowl. Rep. 381. 2 Crompt. & M. 406. 4 Tyr. Rep. 266. S. C.

^d Drake v. Harding, 4 Dowl. Rep. 34. 1 Har. & W. 364. 10 Leg. Obs. 220, 21. S. C.

^e Hutchinson v. Hargrave, 1 Bing. N. R. 369. 1 Scott, 269. S. C. Harrison v. Turner, 4 Dowl. Rep. 72. 1 Har. & W. 346. 10 Leg. Obs. 459, 60. S. C. *per Coleridge, J.*

^f Stat. 12 Geo. 1. c. 29. § 2.

^g R. E. 15 Geo. II. reg. 2. K. B. R. E. 13 Geo. II. reg. 1. C. P. and see Tidd Prac. 9 Ed. 179.

^h Tidd Prac. 9 Ed. 189. (*d.*)

ⁱ Roche v. Carey, 2 Blac. Rep. 850.

^k Swarbrick v. Wheeler, Barnes, 100. and see Manning v. Williams, *id.* 87. Hobson v. Campbell, 1 H. Blac. 248. Hollis v. Brandon, 1 Bos. & P. 36. Green v. Redshaw, *id.* 328. Stevenson v. Danvers, 2 Bos. & P. 110. Garnham v. Hammond, *id.* 298. and see Tidd Prac. 9 Ed. 189.

^l R. H. 2 W. IV. reg. I. § 9. 3 Barn. & Ad. 375. 8 Bing. 269. 2 Crompt. & J. 170.

davit shall be allowed; to supply any deficiency in the affidavit to hold to bail."

An affidavit to hold to bail continues in force for a year; during which period, the defendant may be arrested on the first, or any subsequent process sued out thereon. When an affidavit is made more than a year before the suing out of the writ, it is not in general sufficient to authorize an arrest, in the King's Bench; for the acts require an oath of a subsisting debt, at the time of suing out the process, and after a year, it will be presumed that the debt has been paid, if nothing appear to the contrary^a; which practice has been since adopted in the Common Pleas^b, and Exchequer^c. It is, therefore, in general necessary that a new affidavit should be made, before a writ is sued out, when more than a year has elapsed since the making of the former affidavit. But if the plaintiff make an affidavit to hold to bail, and issue process upon it in due time, which is continued, the defendant may be arrested on the affidavit, although more than a year old^d.

How long
affidavit con-
tinues in force.

The writ of *capias* being sued out, should, by the uniformity of process act^e, be delivered to the sheriff, or other officer or person to whom it is directed; and "so many copies thereof should be delivered to him, together with every memorandum, or notice, subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon, or served therewith:"^f And there is a *proviso* in the act, that "it shall be lawful for the plaintiff, or his attorney, to order the sheriff, or other officer or person to whom the writ shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others^g; which order shall be duly obeyed by such sheriff, or other officer or person: and such service shall be of the same force and effect, as the service of the writ of *summons* there-
in before mentioned, and no other."^h

Delivery of
capias, with
copies thereof,
to sheriff, &c.

Plaintiff, or his
attorney, may
order sheriff, &c.
to arrest some
defendants, and
serve copy of
writ on others.

Upon the delivery of the writ to the sheriff, he will grant his *warrant*ⁱ thereon, directed to his officers, for the execution of it: but,

Warrant, or
mandate, on
capias.

^a Collier v. Hague, 2 Str. 1270.
Pitches v. Davy and others, H. 44 Geo.
III. Stewart v. Freeman, E. 47 Geo.
III. K. B.

^b Taylor v. Slater, 2 Scott, 839. but
see Crooks v. Holditch, 1 Bos. & P. 176.

^c Ramadan v. Maugham, 2 Crompt. M.
& R. 634. 4 Dowl. Rep. 403. 1 Tyr.
& G. 40. 1 Gale, 345. S. C.

^d Hill v. Jervis, 13 Leg. Obs. 30. per

Parke, B.

^e Stat. 2 W. IV. c. 39. § 4. *Ante*,
90, 91.

^f For the form of this Order, see Ap-
pend. to Tidd Sup. 1833. p. 276.

^g Stat. 2 W. IV. c. 39. § 4. *Ante*, 69.

^h Append. to Tidd Sup. 1833. p. 274,

5. And as to the sheriff's warrant to ar-
rest the defendant, see Tidd Prac. 9 Ed.
217.

in the county palatine of *Lancaster*, a *mandate*^a must be previously obtained from the Chancellor of the Duchy, or his deputy, directed to the sheriff, commanding him to execute the same. And the sheriff, in his warrant on a *capias*, need not state the court out of which the writ issues^b. Where the plaintiff's attorney obtained from the sheriff's deputy in *London*, a warrant, which he sent to an officer in the country by the post, but did not pay the postage, and the officer having in consequence refused to take in the letter, it was returned to the dead letter office, the court held that, under these circumstances, the sheriff could not be called on to return the writ^c.

Sheriffs to name deputies, resident in *London*, for receiving writs, and granting warrants, &c.

By the statute 23 Hen. VI. c. 9. sheriffs are required to make yearly a deputy, in the king's courts of his Chancery, the King's Bench, Common Pleas, and Exchequer, of record, before they shall return any writs, to receive all manner of writs and warrants to be delivered to them; which statute was enforced by subsequent rules of court in the King's Bench^d, and Common Pleas^e: and accordingly, by the late act for the further amendment of the law^f, &c. it is enacted, that "from and after the first day of *June* 1833^g, "the sheriff of each county in *England* and *Wales* shall severally "name a sufficient deputy, who shall be resident, or have an office, "within one mile from the *Inner Temple Hall*, for the receipt of "writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders, to be made on, or touching the execution of any process or writ, to be directed to such sheriff."

Duty of sheriff, in executing *capias*.

Within the time limited for the execution of the writ, it is the duty of the sheriff, or his officers, to arrest the defendant^h, if he can be found in his bailiwick, and to detain him, until he shall have given him bail, or made deposit with him, according to law, or until the defendant shall, by other lawful means, be discharged from his custodyⁱ. And there being, in divers parts of *England*, certain dis-

When parcel of one county is

^a Append. to Tidd *Sup.* 1833. p. 275.

C. P.

^b *Astley v. Goodjer*, 2 Dowl. Rep. 619. 2 Crompt. & M. 682. 8 Leg. Obs. 508. *Ashby v. Goodyer*, 4 Tyr. Rep. 414. S. C.; and see *Rose v. Tomblinson*, 3 Dowl. Rep. 49.

^f Stat. 3 & 4 W. IV. c. 42. § 20.

^g This was a day after the bringing in of the bill, but before the passing of the act.

^c *Hart v. Weatherley*, 4 Dowl. Rep. 171. 11 Leg. Obs. 31. S. C.

^h As to the arrest of the defendant, and by whom, and by what authority, when, where, and in what manner, it may be made, see Tidd *Prac.* 9 Ed. 171. 216, &c.; and for the sheriff's duty on the arrest, *id.* 226, &c.

^d R. M. 1654. § 1. R. E. 15 Car. II. reg. 4. K. B.

^e R. M. 1654. § 1. R. H. 14 & 15 Car. II. reg. 1. R. H. 15 & 16 Car. II.

ⁱ Sched. to stat. 2 W. IV. c. 39. No. 4.

tricts and places, parcel of some one county, but wholly situate within and surrounded by some other county, which was productive of inconvenience and delay, in the service and execution of the process of the courts; for remedy thereof it is enacted, that "every such district and place shall and may, for the purpose of the service and execution of every writ and process, whether *mesne* or *judicial*^a, issued out of either of the said courts, be deemed and taken to be part as well of the county wherein such district or place is so situate as aforesaid, as of the county whereof the same is parcel; and every such writ and process may be directed accordingly, and executed in either of such counties."^b

surrounded by another.

It seems, that in order to constitute an arrest, the warrant must be produced; the closest watching of the defendant not being deemed sufficient^c. And if a sheriff's officer send his servant to a party, to inform him that there is a writ out against him, and that he must come and give bail to it, and the party go to the officer's house, and execute a bail bond, this is not an arrest^d. So, where the defendant in *trespass* justified under a *latitat*, and the plaintiff replied a detention after a bail bond given, it was holden that an actual arrest must be proved: proof of the execution of the bail bond, coupled with an admission of the trespass in the special plea, not being sufficient^e.

Arrest, how made.

It has been already seen^f, that *clergymen* are privileged from arrest in going to, and returning from church, or performing divine service: And, by the statute 9 Geo. IV. c. 31. § 23. "if any person shall arrest any *clergyman*, upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanour; and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award." On this statute it has been holden, that a clergyman arrested on his way to the altar, is entitled to be discharged^g.

Of Clergymen.

^a The process usually put in opposition to *mesne* is *final*; *mesne* process being of a *judicial* nature, as well as process of execution: but the term *judicial*, in this clause, was probably intended to mean process after judgment.

^b Stat. 2 W. IV. c. 89. § 20.

^c *Robins v. Hender*, 3 Dowl. Rep. 543. 10 Leg. Obs. 141. *Hender v. Robins*, 1 Har. & W. 204. S. C. per *Williams, J.*

^d *Berry v. Adamson*, 2 Car. & P. 503, and see *Small v. Gray*, *id.* 605. *Peters v. Stanway*, 6 Car. & P. 737. per *Alderson, B.*

^e *Reece v. Griffiths*, 5 Man. & R. 120.

^f *Ante*, 115. and see *Tidd Prac.* 9 Ed. 219.

^g *Goddard v. Harris*, 7 Bing. 320. 5 Moore & P. 122. S. C.

Delivery of
copies of writ,
&c. to defend-
ants.

Indorsement on
writ, of true day
of execution.

When to be
made, and con-
sequence of
omission.

Return of writ.

Detainer on sub-
sequent process.

When the defendant is arrested upon the writ of *capias*, the sheriff, or his officer, is required, by the uniformity of process act^a, "upon " or forthwith after the execution thereof, to cause a copy of the " writ, together with every *memorandum* or notice subscribed thereto, " and all indorsements thereon, to be delivered to every person upon " whom such process shall be executed by him, whether by service " or arrest; and to indorse on such writ, the true day of the exe- " cution thereof, whether by service or arrest." ^b In order to give effect to the last-mentioned provision, there is a general rule of all the courts^c, that "the sheriff, or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within *six* days at the least after the execution thereof, whether by service or arrest, indorse on such writ, the true day of the execution thereof; and in default thereof, shall be liable, in a summary way, to make such compensation, for any damage which may result from his neglect, as the court or a judge shall direct." When the sheriff has neglected to comply with this rule, by not indorsing on the writ of *capias* the day of its execution, the plaintiff's remedy is not by attachment, but by a rule calling on the sheriff to shew cause, why he should not amend his return, and make such compensation to the plaintiff, as the court shall direct; and why he should not pay the costs of the application^d: And he is com- manded by the writ, immediately after the execution thereof, to re- turn the same to the court, together with the manner in which he shall have executed it, and the day of the execution thereof; or that, if the same shall remain unexecuted, then that he do so return the same, at the expiration of *four* calendar months from the date there- of, or sooner, if he should be thereto required by order of the said court, or by any judge thereof^e.

If the defendant be wrongfully taken, without process^f, or after its expiration^g, he cannot be lawfully detained in custody, under sub- sequent process, at the suit of the same plaintiff, though regularly

^a 2 W. IV. c. 39. § 4.

^b *Id. ib.* Append. to Tidd *Sup.* 1833. p. 277.

^c R. M. 3 W. IV. reg. 4. 4 Barn. & Ad. 2. 9 Bing. 444. 1 Cramp. & M. 3.

^d Ridley v. Weston, 2 Moore & S. 724. Moore v. Thomas, 3 Moore & S. 810. 2 Dowl. Rep. 760. S. C.

^e Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Tidd *Sup.* 1833, p. 272.

^f Barlow v. Hall, 2 Anst. 461; and see

Birch v. Prodger, 1 New Rep. C. P. 135. Attorney General v. Dorkings, 11 Price, 156. Attorney General v. Carl Cass, *id.* 345. Wells v. Gurney, 8 Barn. & C. 769. *Ex parte* Scott, 9 Barn. & C. 446. 4 Man. & R. 361. S. C.

^g Loveridge v. Plaistow, 2 H. Blac. 29. and see Spence v. Stuart, 3 East. 89. *Ex parte* Ross, 1 Rose, 261, 2. Rex v. Blake, 4 Barn. & Ad. 355. 2 Nev. & M. 312. S. C.

issued: But third persons, who find a defendant in custody, have a right to consider him as being lawfully in the custody in which he is found, and to proceed against him accordingly; for otherwise a person, under an illegal arrest at the suit of one party, would be completely protected, during his imprisonment, from all other process, which would be productive of great inconvenience, and suspension of justice^a. And a defendant who has been wrongfully arrested upon a *Sunday*, on a charge of *forgery*, without any warrant, may be lawfully arrested upon *civil* process, as he is leaving the police office, after he has been ordered by the magistrate to be discharged^b. The principle to be derived from the cases upon this subject appears to be, that where the sheriff arrests the defendant in one action, it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time; for it would be only an idle and useless ceremony, to arrest the defendant in the others: It would be *actum agere*; and this detainer will hold good, though the court may, upon collateral grounds, unconnected with the act of the sheriff, order the party to be discharged from the first arrest. But where the sheriff has, by his own act, illegally arrested the defendant, the latter is not in custody under the first writ: he is suffering a false imprisonment; and such false imprisonment, being no arrest in the original action, cannot operate as an arrest under other writs lodged with the sheriff^c.

^a *Barclay v. Faber*, 2 Barn. & Ald. 20.

748. 1 Chit. R. 579. S. C.; and see *id.*
579, 80, 81. *in notis.* *Arundel v. Chitty*,
1 Dowl. Rep. 499. 5 Leg. Obs. 270. S. C.
per Littledale, J. Tidd *Prac.* 9 Ed. 219,

^b *Jacobs v. Jacobs*, 3 Dowl. Rep. 675.

^c *Barratt v. Price*, 9 Bing. 566. 570.

2 Moore & S. 634. 1 Dowl. Rep. 725.
S. C. *per Tindal, Ch. J.*

CHAP. XI.

Of the BAIL BOND; and DEPOSIT of MONEY in SHERIFF'S hands, &c.: and of PROCEEDINGS which may be had in VACATION, as well as in TERM TIME.

Proceedings on arrest.

WHEN the defendant has been arrested on the *capias*, he is either discharged out of custody, on giving bail to the sheriff, or an attorney's undertaking to cause special bail to be put in for him, according to the exigency of the writ^a, or on depositing in the sheriff's hands, the sum indorsed thereon, together with 10*l.* in addition, to answer costs, &c. on the statute 43 Geo. III. c. 46. § 2^b; or he remains in custody^c, or escapes^d, or is rescued^e, &c.

Sheriff's duty to take bail, &c.

By the statute 23 Hen. VI. c. 9. it is the duty of the sheriff, when the defendant is arrested and in actual custody, to take bail, if required: and therefore, if a bail bond be tendered, with sufficient sureties, and the sheriff refuse to accept it, and liberate the defendant, he is liable to a special action on the case: and it is no answer to such an action, that the party arrested did not tender a bail bond^f: The sheriff is to prepare the bond; but it seems that he is entitled to be paid for so doing, by the party arrested^g. The bail bond is usually taken in a penalty, being double the amount of the sum sworn to, and indorsed on the writ, notwithstanding the statute 12 Geo. I. c. 29. which directs the sheriff to take bail for that sum, and no more^h: and the sheriff's bail are liable thereon, to the full extent of the debt and costs, not exceeding the penalty of the bondⁱ.

Bail bond, in what sum.

^a As to the nature and effect of an attorney's undertaking to appear, see Tidd *Prac.* 9 Ed. 227.

^b For this statute, and the proceedings thereon, see Tidd *Prac.* 9 Ed. 227, 8, 9.

^c For the proceedings, when defendant remains in custody, see *id.* 229.

^d As to the defendant's escape, and the plaintiff's remedies thereon, see *id.* 235, &c.

^e For the plaintiff's remedies on a rescue, see *id.* 236, 7.

^f Millne v. Wood, 5 Car. & P. 587. *per Taunton, J.* and see Tidd *Prac.* 9 Ed. 223.

^g Turner v. Bayly, Cas. Pr. C. P. 43. Mills v. Bond, Fort. 363. Male v. Mitchell, Pr. Reg. C. P. 67. Lewis v. Knight, 8 Bing. 271. 1 Moore & S. 353. 1 Dowl. Rep. 261. S. C.; but see 3 Bl. Com. 290. *semb. contra.*

^h Walker v. Carter, 2 Blac. Rep. 816. Mitchell v. Gibbons, 1 H. Blac. 76. and see Tidd *Prac.* 9 Ed. 224.

Respecting the *form* of the bail bond, there are three things to be observed; 1st, that it be made to the sheriff himself^a; 2dly, that it be made to him, by his name of office^a; and 3dly, that it be conditioned for the defendant's putting in special bail, as required by the writ, and for that only^a. Before the uniformity of process act^b, the *capias* being returnable in term time, the bail bond was conditioned for the appearance of the defendant at the return of the writ, being a day *certain*, in actions by *bill*, and a *general* return day, in actions by *original*: But, under the above act, we have seen^c, the defendant is required by the *capias*, to take notice, that within *eight* days after the execution thereof on him, inclusive of the day of such execution, he do cause special bail to be put in for him, to the action: and accordingly, the bail bond, as now taken by the sheriff, is conditioned for the defendant's causing special bail to be put in for him to the action, as required by the writ^d: And a bail bond conditioned for the defendant to appear in *eight* days after the *date*, the arrest having been on the same day, has been deemed sufficient^e. But where a bail bond, in reciting the delivery of the writ of *capias*, stated that "a copy of the writ was duly delivered to —," omitting the name of the defendant, and likewise omitting his name in the statement of the condition of the bond, the court, in an action brought against the sheriff for an escape, would not supply the deficiency^f.

Form of.

Variance of, from writ.

The case of the defendant's depositing money in the sheriff's hands, in lieu of finding sureties for his appearance at the return of the writ, under the statute 43 Geo. III. c. 46^g, is not mentioned in the warning, at the foot of the form of the *capias*, given by the uniformity of process act^h. And the court will not interfere, where money has been paid into the hands of the sheriff, in lieu of bail, which he has not paid into courtⁱ. But if money has been deposited in the sheriff's hands, which has been paid into court, the *defendant* is entitled to take it out, on putting in and perfecting bail in due

Deposit in sheriff's hands, on stat. 43 Geo. III. c. 46.

Proceedings thereon.

^a Cotton v. Wale, Cro. Eliz. 862. 4 Bac. Abr. 462. and see Tidd Prac. 9 Ed. 224. *Ante*, 84.

^b 2 W. IV. c. 39.

^c *Ante*, 84.

^d For the form of the bail bond, see Append. to Tidd Sup. 1833. p. 276, 7.

^e Evans v. Moseley, 4 Tyr. Rep. 169. 2 Cramp. & M. 490. 2 Dowl. Rep. 364. S. C.

^f Holding v. Raphael, 1 Har. & W. 571. 5 Nev. & M. 655. S. C. and see Tidd Prac. 9 Ed. 225.

^g For this statute, and the proceedings thereon, see Tidd Prac. 9 Ed. 227, 8, 9.

^h 2 W. IV. c. 39. Sched. No. 4.

ⁱ Smith v. Jones, 8 Leg. Obs. 302. *per Taunton, J.*; and see Hall v. Jones, 4 Dowl. Rep. 712.

time^a: And if the affidavit, in such case, state the bail to have been justified, the court will presume that it has been justified in due time, unless the contrary be shewn by the plaintiff^a. The defendant, however, will not be allowed to take the money out of court, as a matter of right, unless he has put in and perfected bail in due time, according to the exigency of the *capias*, although such a deposit is not mentioned in the warning attached to the writ^b. But if bail has been perfected, though not in due time, before the plaintiff takes the money out, he must make his election, whether he will take the money or the bail^b. And where money has been deposited in lieu of bail, and paid into court by the sheriff, and the defendant does not perfect bail in time, the plaintiff will be allowed, on motion, to take the money out of court, although the defendant has rendered himself into custody, since the time for putting in bail, if there be no affidavit of merits on his part^c. But the court will not make a rule absolute, for the payment of money, so deposited and paid into court, to the plaintiff, where the defendant has neglected to put in and perfect bail above, unless very particular inquiries are made, in order to serve him with a copy of the rule^d.

Proceedings may be had on writs, except at certain times, in term or vacation.

Before the making of the uniformity of process act, (2 W. IV. c. 39,) no proceeding could have been effectually had, in certain cases, on any writ returnable within *four* days of the end of any term, until the beginning of the ensuing term, whereby great and unnecessary delay was frequently created; for remedy whereof, it is enacted by the above statute^e, that “ if any writ of *summons*, *capias*, or *detainer*, “ issued by authority of that act, shall be served or executed on “ any day, whether in term or vacation, all necessary proceedings to “ judgment and execution may, except as thereafter provided, be “ had thereon, without delay, at the expiration of *eight* days from “ the service or execution thereof, on whatever day the last of such “ *eight* days may happen to fall, whether in term or vacation: Pro- “ vided always, that if the last of such *eight* days shall, in any case, “ happen to fall on a *Sunday*, *Christmas* day, or any day appointed

Proviso for Sunday, &c.

^a Young v. Maltby, 3 Dowl. Rep. 604.
1 Har. & W. 214. 10 Leg. Obs. 137.
S. C. per Williams, J.
^b Geach v. Coppin, 3 Dowl. Rep. 74.
79. per Littledale, J.

^c Newman v. Hodgson, 2 Barn. & Ad.
422. 1 Dowl. Rep. 329. S. C.
^d Evans v. Baker, 11 Leg. Obs. 62.
^e § 11. and see 2 Rep. C. L. Com.
27. 30. 61.

"for a public fast or thanksgiving, in either of such cases, the following day shall be considered as the last of such *eight* days; and "if the last of such *eight* days shall happen to fall on any day between the *Thursday* before, and the *Wednesday* after *Easter* day, "then, in every such case, the *Wednesday* after *Easter* day shall be "considered as the last of such *eight* days": Provided also, that if "such writ shall be served or executed on any day between the "tenth day of *August*, and the *twenty-fourth* day of *October*, in any "year, special bail may be put in by the defendant, in bailable process, or appearance entered, either by the defendant or the plaintiff, on process not bailable, at the expiration of such *eight* days: "Provided also, that no declaration, or pleading after declaration, "shall be filed or delivered, between the said *tenth* day of *August*, "and *twenty-fourth* day of *October*." ^a

For period between 10th August and 24th October.

This statute is confined to cases in which a writ of *summons*, *capias*, or *detainer*, has been served or executed. And where a judge's order is obtained in *vacation*, it cannot be made a rule of court till the following term ^b. The *proviso* in the above statute, excepting the period between the *tenth* of *August* and *twenty-fourth* of *October*, is applicable only to *declarations*, and pleadings after declaration; and a defendant arrested within that interval, must put in and justify bail before a judge at chambers, in the same way as in any other part of the vacation ^c. And where a defendant has been irregularly served with process, early in the vacation, he cannot wait until the ensuing term; but is bound to apply in the vacation, to a judge at chambers, if he wish to take advantage of the irregularity ^d.

Decisions thereon.

^a 2 W. IV. c. 39. § 11.

^b *Rex v. Price*, 2 Crompt. & M. 212.
⁴ Tyr. Rep. 60. 2 Dowl. Rep. 233. 7 Leg. Obs. 333, 4. S. C.

^c *Rex v. Sheriff of Middlesex*, in *Wolaston v. Wright*, 2 Crompt. & M. 333.
⁴ Tyr. Rep. 60. 2 Dowl. Rep. 236. S. C.

^d *Cox v. Tullock*, 1 Crompt. & M. 581.
3 Tyr. Rep. 578. 2 Dowl. Rep. 47. S. C. and see *Elliston v. Robinson*, 2 Crompt. & M. 343. 2 Dowl. Rep. 241. 7 Leg.

Obs. 366, 7. S. C. *Tidd Prac.* 9 Ed. 513. And see further, as to what things may be done in *vacation*, as well as in *term* time, by the administration of justice act, (11 Geo. IV. & 1 W. IV. c. 70. §§ 36, 7, 8.) *post*, Chap. XLV.; by the speedy judgment and execution act, (1 W. IV. c. 7. §§ 1, 2, 3.) *post*, Chap. XXII. XXXIII. XXXVII. XXXIX. XLI.; and by the law amendment act, (3 & 4 W. IV. c. 42. §§ 17, 18, 19.) *post*, Chap. XXII. & XXXIII.

CHAP. XII.

Of APPEARANCE to the WRITS of SUMMONS, and DISTINGAS; and of SPECIAL BAIL on the WRIT of CAPIAS; and PAYING MONEY into COURT, in lieu thereof.

Appearance,
what.

How it differed
from bail.

Time formerly
allowed for
entering, in
actions by *ori-
ginal*.

For filing com-
mon bail, in
actions by *bill*,
in K. B.

APPEARANCE is the first act of the defendant in court^a; and differed from putting in *bail*, which was the act of the court itself^b; as is evident from the language of the bail-piece in the King's Bench, wherein the defendant was stated to be *delivered* to bail^c, &c. In actions by *original*, in the King's Bench, the defendant must formerly have entered his appearance, upon a *summons*, *attachment*, or *distringas*, on or before the *quarto die post* of the return of the writ^d. So, in the Common Pleas, the appearance must have been entered within *four* days after the return, which were reckoned *inclusive* both of the return day and the *quarto die post*^e. Afterwards, a rule was made by the judges of all the courts^f, that "a defendant, who had been served with process by *original*, should enter an appearance within *four* days of the appearance day, if the action were brought in *London* or *Middlesex*, or within *eight* days of the appearance day, in other cases; otherwise the plaintiff might enter an appearance for him, according to the statute: and any attorney who undertook to appear, should enter an appearance accordingly." In actions by *bill*, in the King's Bench, where the defendant had been served with a copy of a bill of *Middlesex*, &c. he must formerly have filed common bail at the return of it, or within *eight* days after such return^g, which were reckoned *exclusively*; and *Sunday* was not accounted as one of them, if it happened to be the last^h.

^a Com. Dig. tit. *Pleader*, B. 1.

^b Stroud v. Lady Gerrard, 1 Salk. 8.

^c *Ex parte* Gibbons, 1 Atk. 239. and
see Tidd *Prac.* 9 Ed. 238.

^d Trye, *jus fl.* 67, 8.

^e Fano v. Coken, 1 H. Blac. 9.

^f R. H. 2 W. IV. reg. 1. § 31. 3
Barn. & Ad. 378. 8 Bing. 292. 2
Cromp. & J. 176.

^g Stat. 5 Geo. II. c. 27. § 1.

^h Shadwell v. Angel, 1 Bur. 56. and
see Tidd *Prac.* 9 Ed. 240.

Before the statute 12 Geo. I. c. 29, common bail could only have been filed, or a common appearance entered, by the *defendant*, or his attorney: But, by that statute ^a, as altered by the 5 Geo. II. c. 27. "if the defendant, having been served with process, did not appear at the return thereof, or within *eight* days after such return, the plaintiff, upon *affidavit* of the service of such process, made before a judge, or commissioner of the court for taking *affidavits*, or before the proper officer for entering common appearances, or his deputy, might have entered a common appearance, or filed common bail for the defendant, and proceeded thereon, as if such defendant had entered his appearance, or filed common bail."

Original writs, however, having been abolished by the uniformity of process act ^b, and there being no longer any distinction between proceedings by *original* writ and by *bill* ^c, the time and mode of appearance to serviceable process are now regulated by that act, and the forms of writs of *summons* and *distringas*, &c. in the schedule annexed thereto.

The appearance to serviceable process is entered, either by the *defendant* or his attorney; or, in their default, by the *plaintiff* or his attorney. When the defendant, in ordinary cases, has been personally served with the writ of *summons*, he is commanded thereby, within *eight* days *inclusive* after such service, to cause an appearance to be entered for him, in the court out of which the writ issued; or, in default of his so doing, the plaintiff may, by the terms of the writ ^d, cause an appearance to be entered for him, and proceed therein to judgment and execution. And when the plaintiff proceeds by writ of *summons* against a member of parliament, to enforce the provisions of the statute 6 Geo. IV. c. 16. § 10. the defendant is commanded by the writ, that within *one* calendar month next after personal service thereof on him, he do cause an appearance to be entered for him, in the court wherein he is sued ^e.

In order to entitle the plaintiff, or his attorney, to enter an appearance for the defendant, after he has been served with a copy of the writ of *summons*, an *affidavit* should be made of the service of the writ ^f; though it is not expressly required by the uniformity of pro-

Appearance, or common bail, by plaintiff, on stat. 12 Geo. I. c. 29.

Time and mode of appearance now regulated by stat. 2 W. IV. c. 39.

By whom entered.

On service of writ of summons.

In action against member of parliament.

Affidavit of service of writ.

^a § 1.

^b 2 W. IV. c. 39.

^c *Ante*, 59.

^d Sched. to stat. 2 W. IV. c. 39. No.

1. Append. to Tidd *Sup.* 1833. p. 262, 3.

^e *Ante*, 82.

^f Append. to Tidd *Sup.* 1833. pp. 279, 80. And as to the *affidavit* of the service of process, before stat. 2 W. IV. c. 39. see Tidd *Proc.* 9 Ed. 114. 241, 2. And for the form of the affidavit of such service, see Append. thereto, Ch. V. § 29. Ch. XII. § 4.

Before whom
sworn.

Effect of not
entering appear-
ance, by either
party.

Of defendant's
entering appear-
ance, after plain-
tiff.

On execution of
writ of *distringas*.

Affidavit, or rule,
for entering ap-
pearance, unne-
cessary after
levy.

cess act^a: which service must be personal^b; and it is said, that no difficulty in effecting personal service will dispense with it^c. But where a defendant had admitted that he had received a copy of a writ of *summons*, after a rule for a *distringas* had been obtained, but before the writ had actually issued, the court allowed the plaintiff to enter an appearance for him^d. In the King's Bench, the *affidavit* of service of process could not formerly have been taken before a commissioner, who was concerned as attorney for the plaintiff: In the Common Pleas^e and Exchequer^f, it was otherwise: But, by a general rule of all the courts^g, "no affidavit of the service of process shall be deemed sufficient, if made before the plaintiff's own attorney, or his clerk." This rule was made before the uniformity of process act^h; but it would probably be considered as applicable to the process issued under that act. Where the defendant, on being served with the writ of *summons*, does not enter an appearance, and the plaintiff omits to do it for him, it is a nullity; which is not waived, either by delay in making the application to set aside the proceedings, or by the defendant taking a step in the causeⁱ. And if the defendant neglect to enter his appearance to the writ within *eight* days, and the plaintiff enter an appearance for him, and then the defendant enters an appearance, and gives notice of it, the plaintiff may proceed, as if no such appearance had been entered, and may sign judgment, without a demand of plea^k.

On the execution of the writ of *distringas*, the defendant should, within *eight* days *inclusive* after the return thereof, cause an appearance to be entered for him, in the court out of which the writ issued; or, in default thereof, the plaintiff may, by the terms of the notice subscribed to the writ^l, cause an appearance to be entered for him, and proceed thereon to judgment and execution, in like manner as when the writ of *summons* has been personally served on the defendant^m; or (*if the defendant be subject to outlawry*,) may cause proceedings to be taken to outlaw him. And when a *distringas* has been executed, and the sheriff has made his return, that he has levied *forty*

^a 2 W. IV. c. 39.

^b *Thomson v. Pheney*, 1 Dowl. Rep. 441. 4 Leg. Obs. 252, 3. S. C.

^c *Digby v. Thomson*, 1 Dowl. Rep. 368. 4 Leg. Obs. 156. S. C.; but see *Rhodes v. Innes*, 1 Dowl. Rep. 215. 7 Bing. 329. 5 Moore & P. 153. S. C.

^d *Saunders v. De Chastelain*, 5 Dowl. Rep. 154. 12 Leg. Obs. 244, S. C.

^e R. E. 13 Geo. II. reg. I. C. P.

^f *Doe, d. Cooper, v. Roe*, 2 Younge &

J. 284.

^g R. H. 2 W. IV. reg. I. § 3. 3 Barn. & Ad. 374. 8 Bing. 288. 2 Crompt. & J. 168.

^h 2 W. IV. c. 39.

ⁱ *Roberts (or Roberts) v. Spurr*, 1 Har. & W. 201. 3 Dowl. Rep. 551. 10 Leg. Obs. 136, S. C.

^k *Davis v. Cooper*, 2 Dowl. Rep. 135.

^l Sched. to stat. 2 W. IV. c. 39. No.

^m Append. to Tidd Sup. 1833. p. 269.

ⁿ *Ante*, 135.

shillings, if the defendant does not appear, an appearance may be entered for him by the plaintiff, after the expiration of *eight* days from the return of the writ, without an *affidavit*^a, or rule of court^b. And it is sufficient for the sheriff, on executing a *distringas*, to take all the property on the premises, although it amount to less than *forty* shillings^c. But "if the writ of *distringas* shall be returned *non est inventus* and *nulla bona*^d, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority thereafter given, and any defendant, against whom such writ of *distringas* issued, shall not appear at or within *eight* days inclusive after the return thereof, and it shall be made appear by *affidavit*^e, to the satisfaction of the court out of which such writ of *distringas* issued, or, in vacation, of any judge of either of the said courts, that due and proper means were taken and used to serve and execute such writ of *distringas*, it shall be lawful for such court, or judge, to authorize the party suing out such writ, to enter an appearance for such defendant, and to proceed thereon to judgment and execution."^f

When writ of *distringas* cannot be executed.

In order to obtain a rule of court, or order of a judge, for the plaintiff to be at liberty to enter an appearance for the defendant, an *affidavit*^g must be made, shewing that proper means were taken and used to serve and execute the writ of *distringas*^h; and that, from the facts stated therein, there is reason to believe that the defendant keeps out of the way, to avoid being served with process. And it seems that the court, or a judge, may look at the previous steps taken by the plaintiff, in order to entitle him to a *distringas*ⁱ. On a motion for leave to enter an appearance for the defendant, under the above clause, after return by the sheriff to the *distringas*, of *non est inventus*, and *nulla bona*, it appeared by the *affidavit*, that the person endeavouring to serve the *distringas*, had called several times at the re-

Affidavit for authorizing plaintiff to enter appearance for defendant.

^a Page v. Hemp, 4 Dowl. Rep. 203.
² Crompt. M. & R. 494. 1 Gale, 186.
¹⁰ Leg. Obs. 381, 2. S. C.

^b Tucker v. Brand, 4 Dowl. Rep. 411.
¹¹ Leg. Obs. 463, 4. S. C.; and see Johnson v. Smealey, 1 Dowl. Rep. 526.

^c Jones v. Dyer, 2 Dowl. Rep. 445.
⁸ Leg. Obs. 205. S. C. per Parks, J.

^d Append. to Tidd Sup. 1833. p. 271.

^e *Id.* 280, 81.; and for the rule of court thereon, for entering appearance, in term time, *id.* 282. and judge's order in vacation, *id.* *ib.*

^f Stat. 2 W. IV. c. 39. § 3. And for

the time and mode of appearance by the plaintiff, on stat. 7 & 8 Geo. IV. c. 71.
 § 5. see Tidd Prac. 9 Ed. 113, 14. 243.

^g Append. to Tidd Sup. 1833. p. 280, 81.

^h Balgay v. Gardner, 2 Dowl. Rep. 52.
 Sanderson (or Saunderson) v. Bourn, 2 Crompt. & M. 515. 2 Dowl. Rep. 838.
 S. C. Daniels v. Varity, 3 Dowl. Rep. 26.
⁹ Leg. Obs. 231. S. C. Rouncill v. Bowen,
 4 Tyr. Rep. 374. Copeland v. Nevill, 3 Ad. & E. 668. 5 Nev. & M. 172. 1 Har. & W. 374. S. C.

ⁱ 1 Dowl. Rep. 555.

sidence of the defendant, who was a lodger, and had left a copy of the writ each time, and that he was told the defendant was not within, and that there was nothing belonging to the defendant there, as his lodgings were let to him ready furnished, *Bayley*, B. was of opinion, that the *affidavit* ought to go on to state that the defendant had no effects elsewhere; and when that deficiency was supplied, the plaintiff would be at liberty to enter an appearance for the defendant^a. So, where *three* attempts had been made to serve a *distringas*, which were rendered ineffectual by the conduct of the defendant, or his servants, the court allowed an appearance to be entered for him^b. And if it appear that the defendant keeps out of the way to avoid his creditors, the court will allow an appearance to be entered^c. But where the affidavit stated, that *three* attempts had been made to execute the *distringas*, at the defendant's then *present* or *late* place of abode, Lord *Lyndhurst*, C. B. ruled that it was insufficient, in not stating that endeavours had been made to serve the defendant at his then *present* place of abode; and that it ought to have stated the grounds for believing that he could not be found^d. And the court will not permit the plaintiff to enter an appearance for the defendant, after a *distringas* has issued, upon an *affidavit* which states, that diligent inquiry was made to find the defendant, and that the deponent was unable to find either the defendant, or his place of abode, or any of his goods or chattels^e: The affidavit should state the places at which, and the persons of whom the inquiry was made^f. If the court or a judge, be satisfied with the *affidavit*, they will make a rule^g, or order^h, authorizing the plaintiff to enter an appearance for the defendant; which should be entered accordingly. But if the *affidavit* be insufficient, the plaintiff's only remedy is by suing out a writ of *exigi facias*, and proceeding thereon to outlaw the defendant, as noticed in a former chapterⁱ.

Rule, or order, thereon.

Entering appearance, when one of several defendants only has been served with *capias*.

When there are several defendants, and one of them only has been served with a copy of the *capias*, and not arrested thereon, if the latter defendant do not enter a common appearance within *eight* days after such service, the plaintiff, on an *affidavit* of such service¹, may

^a *Cornish v. King*, 3 Tyr. Rep. 575. 2 Dowl. Rep. 18. 6 Leg. Obs. 110. S. C. per *Bayley*, B.

^b *Tring v. Gooding*, 2 Dowl. Rep. 162.

^c *Copeland v. Nevill*, 4 Dowl. Rep. 51. 10 Leg. Obs. 476, 7. S. C.

^d *Scarborough v. Evans*, 2 Dowl. Rep.

9. 6 Leg. Obs. 362. S. C. Excheq.

^e *Copeland v. Nevill*, 5 Nev. & M.

172. 3 Ad. & E. 668. 1 Har. & W. 374. S. C.; and see *Balgay v. Gardner*, 2 Dowl. Rep. 52. *Daniels v. Varity*, 3 Dowl. Rep. 26. 9 Leg. Obs. 221. S. C.

^f *Append. to Tidd Sup.* 1833. p. 282.

^g *Id. ib.*

^h *Ante*, 91.

ⁱ *Append. to Tidd Sup.* 1833. p. 282.

enter a common appearance for him, and proceed thereon to judgment and execution ^a. And when the attorney, whose name is indorsed on the writ, as having sued out the same, declares that it was not issued by him, or with his authority, the court or a judge, we have seen ^b, may, if it shall appear reasonable so to do, make an order for the immediate discharge of the defendant, who may have been arrested thereon, on entering a common appearance ^c. By the statute 43 Geo. III. c. 46 ^d, when the defendant, on being arrested, is discharged out of custody, on depositing money in the sheriff's hands, in lieu of finding sureties for his appearance at the return of the writ, the plaintiff is authorized, in case the defendant shall not put in and perfect special bail in the action, to enter a common appearance for the defendant, if the plaintiff shall so think fit: And, by the statute 7 & 8 Geo. IV. c. 71. ^e when the defendant, instead of putting in and perfecting special bail, deposits and pays into court the sum indorsed upon the writ, together with an additional sum, as a security for costs, to abide the event of the suit, he is required to enter a common appearance, within such time as he would have been required to have put in and perfected special bail in the action, according to the course of the court; or, in default thereof, the plaintiff is empowered to enter such common appearance for the defendant, and the cause may proceed, as if the defendant had put in and perfected special bail. But where a bail bond is cancelled, for an irregularity in the omission of the day of the month, in the *teste* of the copy of the writ, the plaintiff is not bound to accept an appearance by the defendant, though the entry of it was mentioned as a condition in the rule *nisi* ^f. And where proceedings had been commenced by *capias* against a defendant, who was discharged out of custody, on the ground of a defect in the *affidavit* of debt, without any arrangement being made that he should enter an appearance, the court held that the plaintiff was not entitled to enter it for him ^g.

When defendant is discharged, on declaration of attorney, that writ was not issued by him, or with his authority. After depositing money in sheriff's hands.

After paying money into court, in lieu of special bail.

When plaintiff is not bound to accept appearance.

When not entitled to enter it.

The mode of appearance to the writ of *summons*, &c. is pointed out by the statute 2 W. IV. c. 39 ^h; and declared to be, "by delivering a *memorandum* in writing, according to the form contained

Mode of appearance.

^a Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Tidd *Sup.* 1833. p. 274.

^b *Anie*, 99.

^c Stat. 2 W. IV. c. 39. § 17.

^d § 2. And for the proceedings on this statute, see Tidd *Prac.* 9 Ed. 227, 8.

^e § 2. Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Tidd *Sup.* 1833. p.

274. And for the mode of proceeding on 7 & 8 Geo. IV. c. 71. see Tidd *Prac.* 9 Ed. 244, 5. and *Sup.* thereto, 1830, p. 78.

^f *Perring v. Turner*, 3 Dowl. Rep. 15.

^g *Wilkins v. Parker*, 5 Dowl. Rep. 150, 12 Leg. Obs. 243, 4. S. C.

^h § 2.

"in the schedule annexed thereto, marked No. 2^a; such *memorandum* to be delivered to such officer or person as the court out of which the process issued shall direct, and to be dated on the day of the delivery thereof." And where it appeared that the defendant, on entering an appearance to the writ of *summons*, had made a mistake in the name of the parties; and notice being given to him of the fact by the plaintiff, he promised to amend, but instead of doing so, entered a new appearance, and then demanded a declaration; and the plaintiff not declaring within the following term, he signed judgment of *non pros*, the court was of opinion, that the defendant had been irregular in not amending the appearance, and therefore directed the judgment to be set aside^b. In the Exchequer of Pleas it was a rule, that "where there were more than *four* defendants in a joint action, to be commenced in that court, residing in the same county, if the whole number of defendants appeared by the same attorney, and at the same time, the names of all the defendants should be inserted in one appearance."^c And it was also a rule in that court^d, that "on every appearance to be entered by the sworn or side clerks, as officers of the office of pleas, they should cause to be put the name and address of the attorney at whose instance, and the day on which the same should be entered; and such appearance should be en-

In Exchequer.

Form of entry
of appearance.

^a Append to Tidd *Sup.* 1833, p. 282, 3. And see further, as to the time and mode of *appearance* by the *defendant* or his attorney, before the statute 2 W. IV. c. 39, on a special *original* writ, in the King's Bench or Common Pleas, Tidd *Prac.* 9 Ed. 110. 288; on stat. 7 & 8 Geo. IV. c. 71. *id.* 113, 14; in actions against peers, *id.* 119; members of the House of Commons, *id.* 120; or on common process against the person, by stat. 12 Geo. I. c. 29. *id.* 240; and by the *plaintiff* or his attorney, on same statute, *id.* 241, 2; on stat. 43 Geo. III. c. 46. § 2. *id.* 228. 243, 4; on stat. 45 Geo. III. c. 124. *id.* 120, 21. 243; on stat. 51 Geo. III. c. 124. *id.* 113, 14. 243; on stat. 7 & 8 Geo. IV. c. 71. § 2. *id.* 228. 243, 4; on same statute, § 5. *id.* 113, 14. 243; and on the annual *mutiny* and *marine* acts, *id.* 243. It is not stated in the statute 2 W. IV. c. 39, with what officer the appear-

ance is to be entered; but it seems to have been previously entered with the *filazer*, in actions by *original* writ, in the King's Bench or Common Pleas, Tidd *Prac.* 9 Ed. 110; or against peers, *id.* 119; with the clerk of the common bail, by *bill* against members of the House of Commons, *id.* 120; or, on common process against the person, in the King's Bench, *id.* 240; and, in the Exchequer, in the appearance book, in the office of pleas, *id.* 120: In the latter court, it is now entered with the *filazer*. Dax Ex. Pr. 2 Ed. 7.

^b *Bate v. Bolton*, (or Botten,) 4 Dowl. Rep. 160. 2 Crompt. M. & R. 365. 10 Leg. Obs. 478. S. C. and see *Same v. Same*, 1 Tyr. & G. 148. 4 Dowl. Rep. 677. 12 Leg. Obs. 197. S. C.

^c R. M. 1 W. IV. reg. II § 3. 1 Crompt. & J. 275. 1 Tyr. Rep. 158.

^d R. M. 1 W. IV. reg. II § 5. 1 Crompt. & J. 276, 7. 1 Tyr. Rep. 159.

tered by the defendant's name, by the said sworn clerks^a, in proper books, having an alphabetical index book of reference, entered by the plaintiff's name, to be provided by the clerk of the pleas for each term: which books should be open to the inspection of the said attornies, and their clerks, without fee or reward." For entering an appearance, a fee of *one* shilling is allowed, by rule of court^b, for every defendant, unless an appearance shall be entered for more than one defendant, by the same attorney; and in that case, a fee of *four* pence for every additional defendant.

Fees for entering appearance.

When the defendant has been arrested, and discharged out of custody, upon giving bail to the sheriff, or depositing with him the sum for which he was arrested, together with 10*l.* in addition for costs, he should regularly appear, if not surrendered to and in custody of the sheriff^c, and put in and perfect *special* bail to the action, or bail above; so called, in contradistinction to the sheriff's bail, or bail *below*: Or, instead of putting and perfecting special bail, the defendant may, under the statute 7 & 8 Geo. IV. c. 71, deposit and pay into court the sum indorsed upon the writ, together with an additional sum, as a security for costs, to abide the event of the suit. And though the case of paying money into the hands of the sheriff, as a deposit, and taking it out of court, is not mentioned in the warning at the foot of the form of the *capias* given by the schedule to the uniformity of process act^d, yet it has been holden, that if a defendant deposit money in the hands of the sheriff, pursuant to the 43 Geo. III. c. 46. § 2, which is paid into court, the defendant will not be allowed to take it out, unless he has put in bail, according to the exigency of the *capias*^e. But where an action had been commenced in the Lord Mayor's court, by attachment, against the goods of the defendant, and removed by *certiorari*, it was doubted, whether the defendant could pay money into court, in lieu of special bail^f.

Paying money into court, in lieu of.

By the statute 7 & 8 Geo. IV. c. 71.^g the defendant having deposited money with the sheriff, may, instead of putting in and perfecting special bail, allow the deposit to be paid into court; or, if he re-

After money has been deposited in sheriff's hands, &c.

^a It is now entered with the *filaxer*.
Ante, 140. (a.)

^b R. M. S W. IV. reg. 2. 4 Barn. & Ad. 2. 9 Bing. 443. 1 Crompt. & M. 2.

^c Jones v. Lander, 6 Durnf. & E. 753.
Stamper v. Milbourne, 7 Durnf. & E. 122.

^d 2 W. IV. c. 39. Sched. No. 4.

^e Geach v. Coppin, 3 Dowl. Rep. 74.
Ante, 132.

^f Morgan v. Pedler, 4 Dowl. Rep. 645.
11 Leg. Obs. 309, 10. S. C.

^g § 2. For this statute, and the decisions thereon, see Tidd *Prac.* 9 Ed. 244, 5.

main in custody, or has given bail to the sheriff, he may pay the debt, &c. into court, with *twenty* pounds, to answer costs, and file common bail. And where money has been paid into the hands of the sheriff, in lieu of bail, the defendant, in the Common Pleas, has till the last day allowed for perfecting special bail, to give notice of his intention that the money shall remain in court, to abide the event of the suit^a. In the Exchequer, before bail above are perfected, or until the time for excepting to them has passed, the defendant is entitled, as a matter of right, to pay in the debt, with a sum for costs, under the above statute; and therefore, where he does not pay in the money until after he has put in, though not justified bail above, and the plaintiff has been put to expence by searching for them, and making inquiries, the defendant is not liable to pay those expences, but they are properly costs in the cause^b.

Proceedings
thereon.

If bail has been given to the sheriff on the arrest, the defendant is entitled, by the statute^c, on paying into court the sum indorsed on the writ, with a further sum as a security for costs, to have the bail bond delivered up to be cancelled^d. And where a defendant, having been arrested, paid into court the sum indorsed on the writ, together with 20*l.* as a security for costs, pursuant to the above statute, the court of King's Bench, on the application of the defendant, allowed the plaintiff to take out of court a part of the sum paid in; and unless he consented to accept thereof, with costs, in full discharge of the action, ordered it to be struck out of the declaration, and that the plaintiff should not give any evidence at the trial, as to that sum^e. But if a defendant pay money into court, in lieu of special bail, he cannot afterwards object that the *affidavit*, by which he was held to bail, is defective, notwithstanding the money was paid in, without prejudice to an application to the court on that ground^f. And money deposited in court, in lieu of bail, cannot be transferred to the account of a payment into court, on a plea of tender^g. If money has been paid into court, to

^a *Rowe v. Softly*, 6 Bing. 634. 4 Moore & P. 464. S. C. *Stafford (or Stafford) v. Love*, 3 Dowl. Rep. 593. 1 Har. & W. 195. S. C.; and for the practice in the Exchequer, on paying money into court, in lieu of special bail, see *Graves v. Bennett*, 1 Price N. R. 14. *Thomas v. Gray*, *id.* 86. *Marsh v. Thomson*, *id.* 101.

^b *Stanforth v. M'Cann*, 4 Dowl. Rep. 367. 11 Leg. Obs. 471. *Stamford v. Mac Ann*, 1 Tyr. & G. 169. 1 Gale, 344. S. C.

^c 7 & 8 Geo. IV. c. 71.

^d *Smith v. Jordan*, 2 Moore & P. 428.

^e *Hubbard v. Wilkinson*, 8 Barn. & C. 496. *Tidd Prac.* 9 Ed. 245. Append. thereto, Ch. XXV. § 1. (b.)

^f *Green v. Glasebrook*, 1 Hodges, 27. 1 Scott, 402. 1 Bing. N. R. 516. S. C.

^g *Stultz v. Heneage*, 10 Bing. 561. 4 Moore & S. 472. 2 Dowl. Rep. 806. S. C.; and see *Ball (or Balls) v. Stafford*, 4 Dowl. Rep. 327. 2 Scott, 426. 1 Hodges, 316. S. C.; but see *Same v. Same*, 11 Leg. Obs. 118.

abide the event of the suit, and the defendant wishes to take it out, on perfecting special bail, he must do so before issue joined ^a. And money so paid in, is not considered as a payment to a creditor, within the protection of the statute 6 Geo. IV. c. 16. § 82 ^a; nor is it, if paid in after an act of bankruptcy, and less than *two* months before a commission issued, within the protection of the same statute, § 81 ^a.

If final judgment be given in the action, for the *plaintiff*, he is entitled, by the statute ^b, to receive the money paid into court, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment, and the costs of the application: And if the money paid into court be not sufficient, the court will make an order upon the defendant, to pay such costs ^c. And where money is paid into court in lieu of bail, not by the defendant himself, but by one of the bail, and the plaintiff obtains judgment, he is entitled to have the money paid out to him, in discharge of the debt and costs ^d. But a plaintiff is not entitled to receive out of court, money paid in by a defendant in lieu of bail, under the 7 & 8 Geo. IV. c. 71. § 2. unless judgment has been obtained, or the suit otherwise legally determined ^e. And where money was deposited in court, in lieu of putting in and perfecting bail above, pursuant to the above statute, and the plaintiff obtained a verdict, the court held, that he was not at liberty to issue execution for the whole sum recovered; but was bound to take the sum deposited out of court, and to limit his execution to the surplus only ^f. When final judgment in the action is given for the defendant, the

After judgment
for plaintiff.

For defendant.

^a Ferrall v. Alexander, 1 Dowl. Rep. 132. 3 Leg. Obs. 374. S. C. *per Little-dale, J.* Hanwell v. Mure, 2 Dowl. Rep. 155.

^b 7 & 8 Geo. IV. c. 71. § 2.

^c Freeman v. Paganini, 4 Moore & S. 165. 2 Dowl. Rep. 776. S. C.

^d Bull v. Turner, 1 Meeson & W. 47. 1 Tyr. & G. 367. 4 Dowl. Rep. 734. 12 Leg. Obs. 158. S. C.; and see Douglass v. Stanbrough, 3 Ad. & E. 316.

^e Johnson v. Wall, 4 Dowl. Rep. 315.

^f Hews v. Pyke, 2 Crompt. & J. 359. 2 Tyr. Rep. 313. 1 Dowl. Rep. 322. S. C.

^g Symes v. Rose, 5 Bing. 269. 2 Moore & P. 426. S. C. Grant v. Willis, 4 Dowl. Rep. 581. 11 Leg. Obs. 196. S. C. Wild v. Rickman, 1 Har. & W. 670.

Alterations respecting special bail.

The alterations which have been made by recent statutes, rules of court, and judicial decisions, in the practice of the courts, respecting special bail, may be classed under the following heads: 1. The time of putting in bail: 2. Their number, and qualification: 3. The mode of putting in, excepting to, and justifying them, in ordinary cases: 4. The mode of putting in and justifying them at the same time: 5. The costs of justification, or opposition: 6. The entry of their recognizance on the roll: 7. The liability of bail: and 8. When and how they are discharged, by render, &c.

Time for putting it in.

If the defendant has been discharged out of custody, on giving bail to the sheriff, he should, within *eight* days after the execution of the writ on him, *inclusive* of the day of such execution^a, cause special bail to be put in for him to the action, in the court in which it is brought; or, in default of his so doing, such proceedings may be had and taken, as are mentioned in the warning thereunder written, or indorsed thereon^b. By the practice, it is necessary that there should be *two* bail at least^c; *one* bail not being deemed sufficient, even for the purpose of rendering the defendant^c: and a defendant cannot justify *one* bail, who alone appears, without the consent of the plaintiff^d. In general, there are *two* special bail only, in civil cases: though, in the King's Bench^e, and Exchequer^f, where the debt was large, the court would formerly have allowed *three* or *four* persons to become bail, in different sums, amounting altogether to the requisite sum: The usual course in such case was, to apply to the court for leave to justify a greater number of persons than *two* as bail; and having drawn up the rule, to serve it on the plaintiff's attorney or agent, at the same time as the notice of justification^g. And, by a general rule of all the courts^h, "notice of more bail than *two* shall be deemed irregular, unless by order of the court, or a judge." It is a rule, in the King's Bench and Common Pleas, that "no attorney

Practising attorney, or clerk, not allowed to be bail.

^a Anon. 9 Leg. Obs. 9, 10. *per* Ld. Denman, Ch. J.

^b Sched. to stat. 2 W. IV. c. 39. No. 4. And for the nature of special bail, and by whom, when, and how put in and perfected, see Tidd *Prac.* 9 Ed. 244, &c.

^c Steward v. Bishop, Barnes, 60. 1 Chit. R. 602. *in nota*.

^d White's bail, 5 Dowl. Rep. 133.

^e Anon. Lofft, 26. Anon. *Id.* 252. *Jell v. Douglass*, 1 Chit. R. 601.

^f Wightwick v. Pickering, Forrest, 138.

De Tastel v. Kroger, Wightw. 110.

^g *Easter v. Edwards*, E. 1831. *per* Master *Le Blanc*. 1 Dowl. Rep. 39. 2 Leg. Obs. 45. S. C. and see Tidd *Prac.* 9 Ed. 245.

^h R. H. 2 W. IV. reg. I. § 18. 3 Barn. & Ad. 376. 8 Bing. 290. 2 Crompt. & J. 173. For the form of a *summons*, for leave to put in more than *two* bail, see Append. to Tidd *Sup.* 1832. p. 101; and for an affidavit of facts for that purpose, see Chit. Pr. Append. 319.

shall be bail, in any action pending therein." ^a This rule, which was calculated for the benefit of attornies, and intended to protect them against the importunity of their clients, has been extended to their clerks ^b: And, by a general rule of all the courts ^c, "if any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney, the plaintiff may treat the bail as a nullity, and sue upon the bail-bond, as soon as the time for putting in bail has expired, unless good bail be duly put in in the mean time."

In actions by *original* in the King's Bench ^d, or in the Common Pleas ^e, when the defendant was arrested on a *testatum capias*, bail ^{With whom put in.} must formerly have been put in with the *flacer* of the county into which the *capias* issued; and if put in with the *flacer* of a different county, the plaintiff might have treated it as a nullity, and proceeded against the sheriff, or on the bail bond: But now, by a rule of all the courts ^f, "where a defendant is arrested upon an *alias* or *pluries capias*, issued into another county, pursuant to the rule of *Michaelmas* term, 3 W. IV. § 6. the defendant must put in bail in the county where he was arrested."

In the case of *country* bail, the rules of court formerly required the bail-piece to be transmitted to the chief-justice, or other judge of the court of King's Bench, in *eight* days, if taken within *forty* miles of *London* or *Westminster*, or, if taken above that distance, in *fifteen* days after the taking thereof ^g; and, in the Common Pleas, the bail, if taken within *forty* miles of *London*, were to be transmitted within *ten* days, or, if taken above that distance, within *twenty* days after the taking thereof ^h, unless all the judges were on their circuits, and then as soon as any one of them returned: But it was said that, notwithstanding these rules, the bail-piece must have been actually filed ^{Time for transmitting and filing country bail piece.}

^a R. M. 1654. § 1. R. M. 14 Geo. II. reg. I. K. B. R. T. 24 Eliz. § 8. R. M. 1654. § 1. R. M. 6 Geo. II. reg. V. C. P. 1 Chit. R. 8.

^b Tidd *Prac.* 9 Ed. 247. (g.)

^c R. H. 2 W. IV. reg. I. § 13. 3 Barn. & Ad. 376. 8 Bing. 290. 2 Crompt. & J. 171.

^d Harris v. Calvert, 1 East, 608. Rex v. Sheriff of *Middlesex*, 1 Chit. Rep. 237.

^e R. T. 1 W. & M. reg. 2. C. P. Garnett v. Heavyside, Barnes, 68. Fisher

v. Levi, 2 Blac. Rep. 1061. Clempson v. Knox, 2 Bos. & P. 516. Longworth v. Healey, 3 Moore, 76. Rex v. Sheriff of *Essex*, in Levy v. Paine, 3 Moore & S. 870. and see Tidd *Prac.* 9 Ed. 250, 51.

^f R. M. 4 W. IV. 5 Barn. & Ad. 816. 10 Bing. 344. 2 Crompt. & M. 352. Chapm. K. B. 3 *Addend.* pp. 7. 214.

^g R. T. 8 W. III. reg. III. § 3. K. B.

^h R. 10 Mar. 5 W. & M. § 3. C. P.

with one of the judges, on the *sixth* day after the return of the writ in the King's Bench, or *eighth* day in the Common Pleas, or the bail-bond might be assigned^a. And, by a general rule of all the courts^b, "in the case of *country* bail, the bail-piece shall be transmitted and filed within *eight* days, unless the defendant reside more than *forty* miles from *London*; and in that case, within *fifteen* days after the taking thereof." This rule, however, is abrogated by the uniformity of process act^c; upon which it has been determined, that where a defendant is arrested, either in *town* or *country*, under a writ of *capias*, he has only *eight* days to put in special bail, and give notice thereof to the plaintiff's attorney^d: And such bail is not deemed to be put in, until notice thereof be served on the plaintiff's attorney, or agent^d.

Notice of bail.

It was not formerly deemed necessary to mention, in the notice of bail, the *number* of the house, in the street in which they were stated to reside^e; though, when mentioned therein, a mistake of the number was a ground of rejection^f: But now, by a general rule of all the courts^g, "every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number if any, where each of the bail resides; and all the streets or places, and numbers if any, in which each of them has been resident, at any time within the last *six* months, and whether he is a housekeeper or freeholder."^h This rule applies equally to *town* and *country* bailⁱ; and a notice of bail, omitting to state the residence of the bail for the last *six* months, is an irregularity, of which the court will take notice, though the bail be unopposed^k. It has been holden that the actual, and not the constructive residence of the bail, must be mentioned in the notice^l;

Construction of rule, and decisions thereon.

^a Imp. K. B. 10 Ed. 137. Imp. C. P. 7 Ed. 129, 30. Tidd *Prac.* 9 Ed. 252.

^b R. H. 2 W. IV. *reg. I.* § 14. 3 Barn. & Ad. 376. 8 Bing. 290. 2 Crompt. & J. 172.

^c 2 W. IV. c. 39.

^d Grant v. Gibbs, 1 Scott, 390. 1 Hodges, 56. 3 Dowl. Rep. 409. 9 Leg. Obs. 475, 6. S. C.

^e Anon. H. 1831. *per Parke*, J.

^f Anon. *Per Cur.* H. 55 Geo. III. K. B. 1 Chit. R. 493. *in notis*, and see Tidd *Prac.* 9 Ed. 254.

^g R. T. 1 W. IV. *reg. I.* § 2. 2 Barn. & Ad. 788. 7 Bing. 782. 1 Crompt. &

J. 470.

^h Append. to Tidd *Sup.* 1832. pp. 102, 3.

ⁱ Anon. 1 Moore & S. 296. 1 Dowl. Rep. 259. S. C. Beal's bail, 3 Dowl. Rep. 708. 10 Leg. Obs. 253. S. C.

^k Sywood v. Dogherty, 1 Scott, 79. Welsh v. Lywood, 1 Bing. N. R. 258. Sywood and Dogherty's bail, 3 Dowl. Rep. 116. Dogherty's bail, 9 Leg. Obs. 236. S. C.

^l Thomson v. Smith, 1 Dowl. Rep. 340. Anon. 4 Leg. Obs. 93. S. C. *per Taunton*, J. and see Thomson's (or Thompson's) bail, 1 Dowl. Rep. 497. 5 Leg. Obs. 225. S. C. *per Littledale*, J.

which should state particularly the streets ^a or places, and numbers of the houses ^b, if any, in which the bail reside: And where one of the bail was described in the notice as of "*Cloth Fair*," omitting the name of the street in that quarter wherein he resided, it was deemed insufficient ^c. But the name of a *township*, without the name of the street stated to be in a certain parish named in the notice of bail, has been deemed sufficient ^d. If a bail has two places of residence, it is only necessary to state one of them in the notice of bail ^e. And the objection to a notice of bail, that the number of the street is not stated, must be taken in the first instance; and it is waived, by obtaining time to inquire, unless it be sworn that the bail's residence cannot be found ^f. It has also been deemed sufficient to state in the notice, the places of residence of the bail for the last *six* months, without stating that they have resided there for that period ^g. The court, it appears, interfered in several cases, to set aside the rule for the allowance of bail, on the ground that one of them had misstated his place of residence ^h. This practice, however, was soon found to be so inconvenient, that it was laid aside; and now, it seems, that the only remedy is by indicting the party for perjury, if he has misdescribed himself ^h. The notice must also state the bail to be *house-*

^a Hanwell's bail, 3 Dowl. Rep. 425. 9 Leg. Obs. 318. S. C.

^b Muir (or Innis) v. Smith, 2 Tyr. Rep. 742. 2 Crompt. & J. 634. S. C.

^c Topham v. Calvert, 1 Price N. R. 140.; but see Smith's bail, 1 Dowl. Rep. 499. 5 Leg. Obs. 271. S. C. *per Littledale, J.* Treasure's bail, 2 Dowl. Rep. 670. *per Alderson, B.*

^d Lanyon's bail, 3 Dowl. Rep. 85. 9 Leg. Obs. 222. S. C. *per Littledale, J.*

^e Anon. 1 Dowl. Rep. 159. 3 Leg. Obs. 408. S. C. Fortescue's bail, 2 Dowl. Rep. 541. 8 Leg. Obs. 347. S. C. *per Patteson, J.*

^f Foster's bail, 2 Dowl. Rep. 586. 8 Leg. Obs. 397. S. C. *per Patteson, J.*

^g Fenton v. Warr, (or Warre,) 1 Price N. R. 140. 2 Crompt. & J. 54, 5. 2 Tyr. Rep. 158. 1 Dowl. Rep. 295. Warre's bail, 3 Leg. Obs. 98. S. C. *per Bayley, B.* and see Anon. 1 Dowl. Rep. 160. 3 Leg. Obs. 344. S. C.; but see Anon. 2 Crompt. & J. 55. (a.) *per Littledale, J.* Holling's bail, 13 Leg. Obs.

29, 30. *per Littledale, J.*; and see the cases of Johnson's bail, 1 Dowl. Rep. 438. 4 Leg. Obs. 332. S. C. *per Patteson, J.* and Ward's bail, 3 Tyr. Rep. 208. 1 Crompt. & M. 28. 1 Dowl. Rep. 596. 5 Leg. Obs. 63. S. C. *per Gurney, B.* The case of Johnson's bail, however, was that of a notice of justification, and contrary to former decisions in the cases of Warre's bail, 3 Leg. Obs. 98. *per Bayley, B.* and Higg's bail, 1 Dowl. Rep. 124. 3 Leg. Obs. 167. S. C. *per Littledale, J.*: and though, in the case of Ward's bail, Mr. Baron Gurney ruled that a notice of bail, describing the bail to have resided *within* (instead of *for*) the last *six* months at a particular place, is bad; yet, after conference with the other barons, he held, that if the affidavit of justification is correct, it may be connected with the notice of bail, so as to make such notice sufficient.

^h Englefield v. Stephens (or Stevens,) 2 Dowl. Rep. 438. 8 Leg. Obs. 206. S. C. *per Parke, J.*

keepers, or freeholders ^a, although accompanied by an *affidavit* of justification ^b. But an omission to describe the bail in the notice, as housekeepers or freeholders, does not, under the above rule, authorize the plaintiff to take an assignment of the bail bond ^c: The objection should be made, when the bail come up to justify ^e. And an informality in the notice of bail, does not render the proceeding null, so as to justify the plaintiff in issuing an attachment against the sheriff ^d. In the Exchequer, if the defendant be a prisoner, the notice of bail must state that fact ^e.

Recognizances,
and notice of
bail, &c. in Ex-
chequer.

In the Exchequer of Pleas, it is a rule ^f, that "all recognizances of bail, in actions in the office of pleas, when taken or allowed by a baron, shall be left by the attorney for the defendant or defendants, with the sworn or side clerks, or their deputy ^g, in the office of pleas, until duly allowed; who shall enter the same in a book to be kept by them for that purpose, having an alphabetical index of reference; which book shall be open to the inspection of the attornies, or their clerks: And notice of such bail being allowed, and left and filed in the said office of pleas, with the names, descriptions and address of the bail, shall be given by the attorney for the defendant or defendants, to the attorney for the plaintiff or plaintiffs, within the times prescribed for giving notice of bail, by the former rules of this court; and proceedings may be thereupon had, for excepting to and perfecting such bail, within the times and in like manner as is and are prescribed by the existing rules and practice of this court, except so far as the same may be altered by that, or any subsequent rule of this court."

Excepting to
bail, after
assignment of
bail bond.

When the bail to the sheriff became bail above, the plaintiff, in the King's Bench, was not formerly at liberty to except to them, after he had taken an assignment of the bail-bond ^h; for by so doing, he ad-

^a Beal's bail, 3 Dowl. Rep. 708. 10 Leg. Obs. 263. S. C.

^b Terry v. Pearce, 1 Price N. R. 141, 2. 3 Leg. Obs. 98. S. C. Anon. 1 Dowl. Rep. 126. 3 Leg. Obs. 327. S. C. Anon. 1 Dowl. Rep. 160. 3 Leg. Obs. 344. S. C.

^c Bell v. Foster, 8 Bing. 334. 1 Moore & S. 518. 1 Dowl. Rep. 271. S. C. De Bode's bail, *Id.* 368. 4 Leg. Obs. 237. S. C. *per Taunton, J.*

^d Rex v. Sheriff of Middlesex, in Duncombe v. Crisp, 1 Crompt. & M. 482. 3 Tyr. Rep. 440. 2 Dowl. Rep. 5. 6 Leg.

Obs. 444. S. C. and see Wigley v. Edwards, 4 Tyr. Rep. 235.

^e Fuller's bail, 5 Tyr. Rep. 491.

^f R. M. 1 W. IV. reg. II. § 4. 1 Crompt. & J. 275. 1 Tyr. Rep. 156. and see Tidd *Prac.* 9 Ed. 251.

^g They are now filed with the *filazer*. Dax Ex Pr. 2 Ed. 72, 3.

^h Anon. 1 Salk. 97. Fish v. Horner, 7 Mod. 62. How v. Granville, *id.* 117. Grovener v. Soame, 6 Mod. 122. R. M. 8 Ann. reg. I. (c.) R. E. 5 Geo. II. reg. 1. (a.) K. B.

mitted them to be sufficient: but if exception were taken to the bail *before* the bond was assigned, they were bound to justify, notwithstanding such assignment ^a. In the Common Pleas, however, it was a rule ^b, that "in all cases wherein bail-bonds should be taken, and the same bail was put in above, the plaintiff might except against such bail:" And now, by a general rule of all the courts ^c, "when bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond."

Formerly, when the bail put in did not mean to justify, others might have been *added*, as a matter of course, within the time allowed for their justification; and if there were not time enough, the defendant's attorney might have taken out a summons, and obtained an order for further time ^d: But now, by a general rule of all the courts ^e, "the bail, of whom notice shall be given, shall not be changed, without leave of the court or a judge." ^f On this rule, if it be necessary, application may be made to the court or a judge, on an affidavit of the circumstances ^g, for leave to add, and time to justify bail: And, in a late case, where the agent for the defendant had not time to communicate with his principal in the country, so as to obtain the names of good bail, the court of Exchequer allowed the bail to be changed, upon payment of costs, and putting the plaintiff in the same situation, as if good bail had been put in in the first instance ^h. This rule does not, it seems, apply to the case of a pri-

Changing bail.

^a Hill v. Jones, 11 East, 321.

^b R. M. 6 Geo. II. reg. II. C. P. Ormond v. Griffith, Barnes, 63. Boughton v. Chaffey, 2 Wils. 6. and see Tidd Prac. 9 Ed. 255. 306.

^c R. H. 2 W. IV. reg. I. § 15. 3 Barn. & Ad. 376. 8 Bing. 290. 2 Crompt. & J. 172.

^d 1 Crompt. Pr. 3 Ed. 62. 84, &c. and see Tidd Prac. 9 Ed. 258.

^e R. T. 1 W. IV. reg. I. § 5. 2 Barn. & Ad. 788. 7 Bing. 783. 1 Crompt. & J. 470.

^f Previously to the above rule, a disgraceful practice had prevailed of putting in *nominal* or *sham* bail, in the first instance, who were hired for the purpose, and when they were excepted to, of adding and justifying *real* bail, which was allowed as a

matter of course, without any cause being assigned for it; but this practice is now abolished. See 1 Rep. C. L. Com. 104. For the form of a summons for leave to add one or more bail, on the above rule, see Append. to Tidd Sup. 1832. p. 103. and for the judge's or baron's order thereon, *id.* 104. For an affidavit in support of such summons and order, see Chit. Pr. 329, 30.; and for notices of adding and justifying bail, by previous leave of a judge or baron, see Append. to Tidd Sup. 1832. p. 104.

^g For affidavits to obtain further time to justify, or add and justify bail, see Chit. Pr. Append. 336, &c.

^h Whitehead v. Minn, 2 Crompt. & J. 54. 2 Tyr. Rep. 160. 1 Price N. R. 136. S. C.

soner^a; but it has been holden to apply to the case of new bail, put in by the sheriff, without leave of the court, for the purpose of rendering the defendant^b. And an affidavit that the party did not procure sufficient bail, because he expected to settle the cause, is not a sufficient reason to entitle him to change his bail^c. The costs of bail, changed by a judge's order for that purpose, must be paid before the bail can justify^d.

Notice of justification, when given.

In the King's Bench, where the bail already put in intended to justify, *one* day's previous notice of justification, or notice for the next day, was formerly deemed sufficient^e, unless *Sunday* intervened, and then notice must have been given on *Saturday* for *Monday*^f: But where other bail were added to those already put in, there must have been *two* days' previous notice of justification, one *inclusive* and the other *exclusive*, as *Monday* for *Wednesday*^g; or, if *Sunday* intervened, *Saturday* for *Tuesday*, &c. In the Common Pleas, *two* days' notice of justification must formerly have been given, as well where the bail already put in intended to justify, as in the case of added bail^h; and *Sunday* was not reckoned a day for this purpose: therefore notice of added bail on *Saturday* for *Monday*, was not deemed sufficient^h. And now, by a general rule of all the courtsⁱ, "it shall be sufficient in all cases, if notice of justification of bail be given *two* days before the time of justification:" And *two* days' notice of justification is sufficient with country bail, if they justify according to the old practice^k. When bail above were put in, and exception entered in *vacation*, the defendant's attorney, in the King's Bench^l and Exchequer^m, must formerly have given notice, within *four* days after the exception, of justification of the same bail, for the *first* day of the next term; or the plaintiff might have taken an assignment of the bail-bondⁿ. In the Common Pleas, notice of

When put in and excepted to in vacation.

^a Bird's bail, 2 Dowl. Rep. 583. 8 Leg. Obs. 397. S. C. but see Stroud v. Kenny, 4 Moore & S. 248. *contra*.

^b Rex v. Sheriff of Essex, in Levy v. Paine, 4 Moore & S. 247. 2 Dowl. Rep. 792. S. C.

^c Orchard v. Glover, 9 Bing. 318. 2 Moore & S. 396. 1 Dowl. Rep. 707. S. C.

^d Jourdain v. Gunn, 2 Tyr. Rep. 491.

^e Wright v. Ley, H. 15 Geo. III. K. B.

^f Anon. *Per Cur.* M. 21 Geo. III.

K. B. Millson v. King, 9 East, 435.

Morgan's bail, 1 Chit. R. 308.

^g Teale v. Cheshire, Barnes, 82. El-

ton v. Manwaring, and Thomas v. Same, *id.* 88. Nation v. Barrett, 2 Bos. & P. 30.

— v. Marshall, 1 Marsh. 322.

^h Gregory v. Reeves, Barnes 303. and see Tidd *Prac.* 9 Ed. 259, 60.

ⁱ R. H. 2 W. IV. reg. I. § 16. 3 Barn. & Ad. 376. 8 Bing. 290. 2 Cramp. & J. 172.

^k Hardbottle (or Harbottle) v. Clark, 4 Dowl. Rep. 12. 10 Leg. Obs. 206. S. C.

^l Millson v. King, 9 East. 434.

^m Man. Ex. Pr. 103.

ⁿ Millson v. King, 9 East, 434.

justification might have been given at any time in vacation, so as there were *two* days' notice before the *first* day of the next term^a. And now, by a general rule of all the courts^b, "if bail to the action are excepted to in *vacation*, and the notice of exception require them to justify before a judge, the bail shall justify within *four* days from the time of such notice, otherwise on the *first* day of the ensuing term." But bail cannot be justified by a defendant, not in custody, at a judge's chambers, in *vacation*, unless required by the plaintiff, pursuant to the above rule^c.

The justification of bail is either in *person*, or by *affidavit*. By a general rule of all the courts^d, "if the notice of bail shall be accompanied by an *affidavit* of each of the bail, according to the form thereto subjoined^e, and the plaintiff shall not give *one* day's notice of exception^f to the bail, by whom such affidavit shall have been made, the recognizance of such bail may be taken out of court, without other justification than such affidavit." The form subjoined to the above rule, requires the bail to swear that he is a housekeeper, (or freeholder,) residing at ———, (*describing particularly the street or place, and number, if any;*) that he is possessed of property, to the amount required, over and above all his just debts; that he is not bail for any defendant, except in that action, (or, if bail in any other action or actions, stating them, with the courts in which they were brought, and sums in which the deponent is bail;) that his property consists of ———, (*specifying the nature and value of the property, in respect of which he proposes to justify;*) and that he hath for the last six months resided at ———, (*describing the place or places of such residence*). The above rule, however, does not apply to the case of a prisoner^g; nor where the bail are put in, after the regular time for putting them in has expired; for then the bail must actually justify, as formerly, without an exception, before a motion can be made to set aside proceedings, upon the ground that bail have been put in and justified^h. And an objection to bail, on the ground that the notice of justification did not state whether they would justify personally or by *affidavit*, is not good, if the bail appear personallyⁱ.

Justification in person, or by affidavit. Affidavit of justification, on R. T. 1 W. IV. reg. 1. §§ 3, 4.

^a Fowles v. Grosvenor, Barnes, 101. 4.

and see Tidd Prac. 9 Ed. 260.

^b R. H. 2 W. IV. reg. I. § 17. 3
Barn. & Ad. 376. 8 Bing. 290. 2 Crompt. & J. 172, 3.

^c Barratt v. James, 5 Dowl. Rep. 123.
12 Leg. Obs. 322. S. C.

^d R. T. 1 W. IV. reg. I. §§ 3, 4. 2
Barn. & Ad. 788. 7 Bing. 783. 1 Crompt. & J. 470. and see Tidd Prac. 9 Ed. 263,

^e Append. to Tidd Sup. 1832. p. 105.

and see 1 Rep. C. L. Com. 108, 9. 137.

^f Append. to Tidd Sup. 1832, p. 103.

^g Webb's bail, 1 Dowl. Rep. 446. 4

Leg. Obs. 317. S. C. per Patteson, J.

^h Rex v. Sheriff of Middlesex, in Rogers v. Porter, 3 Dowl. Rep. 255.

ⁱ Norton's bail, 1 Meeson & W. 632.
5 Dowl. Rep. 85. 12 Leg. Obs. 46. S. C.

On R. H. 2 W.
IV. reg. I. § 19.

By a subsequent rule of all the courts^a, which seems to extend to *affidavits* of justification of *country*, as well as *town* bail, "*affidavits* of justification shall be deemed insufficient, unless they state that each person justifying is worth the amount required by the practice of the courts, over and above what will pay his just debts, and over and above every other sum for which he is then bail."

Decisions on the
foregoing rules.

If the bail justify by *affidavit*, in pursuance of the above rules, the notice of bail must be accompanied either by the original *affidavit*, or by a copy, purporting on the face of it to be a copy^b. The *affidavit* of justification, on these rules, may be made by the bail *jointly*^c: But they must swear themselves to be *housekeepers*, or *freeholders*; swearing that they are *householders* is not sufficient^d: and if a bail be described as a *housekeeper*, and he is not, the fact of his being a *freeholder* will not cure the defect^e. It is not sufficient for bail to swear that they are *possessed* of so much money, over and above what will pay their just debts; but they must swear that they are *worth* such sum^f. And where the *affidavit* stated only that the bail had a certain sum in the funds, without stating in what fund, it was deemed insufficient^g. So, where an *affidavit* of sufficiency omits to state the place where the property of the bail is situate, and only ascribes the value to the several kinds of property collectively, it is a departure from the form given by the rule; and the bail having justified, the defendant is not entitled to the costs of justification^h. But it is sufficient, if the bail swear that they are worth the amount

^a R. H. 2 W. IV. reg. I. § 19. 3 Barn. & Ad. 376, 7. 8 Bing, 290, 91. 2 Crompt. & J. 173.

^b West v. Williams, 3 Barn. & Ad. 345.

^c 1 Dowl. Rep. 162. 3 Leg. Obs. 265.

S. C. De Bode's bail, 1 Dowl. Rep. 368.

^d 4 Leg. Obs. 237. S. C. per Taunton, J.

^e 6 Leg. Obs. 156. (a.) S. C. cited.

^f Anon. 1 Dowl. Rep. 115. 3 Leg. Obs. 59. S. C.

^g Anon. 1 Dowl. Rep. 127. 3 Leg. Obs. 327. S. C.

^h Wilson's bail, 2 Dowl. Rep. 431. 7 Leg. Obs. 28. S. C. per Littledale, J.

ⁱ Simpson's bail, 1 Dowl. Rep. 605. 5 Leg. Obs. 64. S. C. Darling v. Hutchinson, (or Hutchinson's bail,) 2 Tyr. Rep. 491. 2 Crompt. & J. 487. 1 Dowl. Rep. 571. S. C. Rogers v. Jones, 3 Tyr. Rep. 256. 1 Crompt. & M. 323. 1

Dowl. Rep. 704. Jones' bail, 5 Leg. Obs. 240. S. C. Worlison's (or Woolison's) bail, 2 Dowl. Rep. 53. 6 Leg. Obs. 59. S. C. Harrison's bail, 2 Dowl. Rep. 198. 6 Leg. Obs. 492. S. C. Time, however, was given by the court in these cases, to amend the *affidavit*, upon payment of costs. But, in a late case, the court of Exchequer refused to permit such amendment. Naylor's bail, 3 Dowl. Rep. 452. 9 Leg. Obs. 318. S. C. Worlison's (or Woolison's bail), 2 Dowl. Rep. 53. 6 Leg. Obs. 59. S. C.

^k Anon. 1 Dowl. Rep. 159. 3 Leg. Obs. 408. S. C.

^l Hodgson v. Cooper, 2 Crompt. M. & R. 43. 5 Tyr. Rep. 740. S. C. Cooper's bail, 3 Dowl. Rep. 692. 10 Leg. Obs. 316. S. C.; but see Boyd's bail, 1 Hodges, 93. 1 Scott, 696. S. C.

required, after payment of all their *just* debts^a, or over and *all above* their just debts^b. And an affidavit made by a bail, swearing that "*he 's*" possessed, instead of "*he is*" possessed; and, instead of stating that he was worth property to the required amount, "*over and above his just debts*," that he was worth the required sum, "*over and above what would pay his just debts*;" and, in stating of what his property consisted, instead of swearing to good *book* debts owing to him, omitting the word *book*, has been deemed sufficient^c. So, where only one kind of property was described, it was holden that the value sufficiently appeared by reference to the previous part of the affidavit, wherein it was sworn that the bail was worth a sufficient sum, &c.^d An affidavit that the deponent is not bail for *any*, without adding "*other person*," has been deemed sufficient^e. And an affidavit of sufficiency by country bail, purporting to be according to the above rules, and not containing all its requisites, was, in one case^f, deemed good, if sufficient according to the old rules. So, an affidavit of justification may be sufficient, if the rule be substantially complied with, though it is not exactly conformable thereto^g. But in a subsequent case^h, where a defendant had adopted the new rules, in giving notice of bail, it was holden, that he must also use the form of affidavit therein given to justify; and that an affidavit, therefore, according to the old form, was insufficient.

Before the act for the more effectual administration of justice in *England* and *Wales*ⁱ, bail were justified in *term* time, either in *full* court, or, in the King's Bench, before a judge in the *bail* court, holden before one of the judges, in pursuance of the statute 57 Geo. III. c. 11^k, except where the defendant was a prisoner, in which case they might have been justified before a judge at chambers, in *vacation*, by the statute 43 Geo. III. c. 46. § 6^l. But now, by the above

Justification in court, or at chambers.

^a Anon. 2 Younge & J. 101.; and see *Topham v. Calvert*, 1 Price N. R. 140, 41.

^b *Boyd's bail*, 1 Hodges, 93. *Housley v. Boyd*, 1 Scott, 698. S. C. *per Park*, J. *Hunt's bail*, 4 Dowl. Rep. 272. 1 Har. & W. 520. 11 Leg. Obs. 45. S. C. *per Littledale*, J.

^c *Lanyon's bail*, 3 Dowl. Rep. 85. 9 Leg. Obs. 222. S. C. *per Littledale*, J. and see *O'Kill's bail*, 2 Dowl. Rep. 19. 6 Leg. Obs. 363. S. C.

^d *Boyd's bail*, 1 Hodges, 93. *Housley v. Boyd*, 1 Scott, 698. S. C.

^e *Smith's bail*, 1 Dowl. Rep. 514. 5

Leg. Obs. 112. S. C. *per Littledale*, J.

^f Anon. 1 Dowl. Rep. 115. 3 Leg. Obs. 59. S. C.

^g *Perry's bail*, 1 Dowl. Rep. 606. 5 Leg. Obs. 64. S. C. *per Gurney*, B. and see *Bell v. Foster*, 1 Moore & S. 518. *Hunt's bail*, 4 Dowl. Rep. 272. 1 Har. & W. 520. S. C. *per Littledale*, J.

^h *Penson's bail*, 4 Dowl. Rep. 627. 1 Har. & W. 663. 11 Leg. Obs. 403. S. C. *per Patteson*, J.

ⁱ 11 Geo. IV. & 1 W. IV. c. 70.

^k *Tidd Prac.* 9 Ed. 262. *Ante*, 23.

^l *Tidd Prac.* 9 Ed. 279.

In Exchequer. act^a, "bail may be justified before a judge in chambers, or in some other convenient place to be by him appointed, as well in term as in vacation, and whether the defendant be actually in custody or not."^b Agreeably to this act, a rule of court was made in the Exchequer^c, that "all special bail shall be justified, within *four* days after exception, before a baron at chambers, as well in term as in vacation." But, by a subsequent rule of that court^d, "justification of bail in term time, shall, unless by consent, take place, as heretofore, in open court; and the justification of bail before a baron at chambers, shall be confined to cases of consent, and to justification in vacation."

Putting in and justifying bail, at same time.

Previously to the rule of *Trin.* 1 W. IV. reg. I. § 1. ^e bail could not in general have justified, unless by consent, or in the case of *prisoners*, at the same time as they were put in; and therefore, when good bail were put in, they had the trouble of attending twice, if excepted to, at different times and places, first, at the judge's chambers, when they were put in, and afterwards in court, to justify^f: But now, by the above rule, "a defendant may justify bail, at the same time at which they are put in, upon giving *four* days' notice for that purpose^g, before *eleven* o'clock in the morning, and exclusive of *Sunday*: and if the plaintiff is desirous of time to inquire after the bail, and shall give *one* day's notice thereof^h as aforesaid, to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed *three* days in the case of *town* bail, and *six* days in the case of *country* bail, then (unless the court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly; and all proceedings shall be stayed in the mean time." This rule does not apply to *country* bailⁱ: and, in the case of *town* bail, it is not compulsory on the defendant, to justify bail at the time of putting them in; but he may still proceed, as formerly,

^a 11 Geo. IV. & 1 W. IV. c. 70. § 12.

^b For the form of notice of justification by same bail, in court, see Append. to Tidd *Sup.* 1832. p. 106.; and by bail at chambers, on stat. 11 Geo. IV. & 1 W. IV. c. 70. § 12. *id.* *ib.*

^c R. M. 1 W. IV. reg. II. § 16. 1 Crompt. & J. 281. 1 Tyr. Rep. 163.

^d R. H. 1 W. IV. 1 Crompt. & J. 385. 1 Tyr. Rep. 291. and see Tidd *Prac.* 9 Ed. 264.

^e 2 Barn. & Ad. 788. 7 Bing. 782.

^f 1 Crompt. & J. 469.

^g Chit. Pr. 50. and see Tidd *Prac.* 9 Ed. 259.

^h Append. to Tidd *Sup.* 1832. pp. 104, 5.

ⁱ *Id.* 105.

^j Jones' bail, 2 Dowl. Rep. 159. Smith's bail, 7 Leg. Obs. 11. S. C. Harbottle v. Clark, 4 Dowl. Rep. 12. but see Winter's bail, 13 Leg. Obs. 62.

by putting in bail before a judge, and waiting till they are excepted to, before justification, and then justifying them, on their personal attendance in open court, or before a judge or baron at his chambers. And where the defendant had put in bail by affidavit, but omitted to give *four days'* notice of justification, the plaintiff having proceeded on the bail bond, the court refused to stay proceedings, upon an application made within *twenty days* after justification^a. On this rule, a notice that bail will be put in and justify at the same time, must be a *four days'* notice, exclusive of *Sunday*; and must be served before *eleven o'clock* in the forenoon^b. But it is not necessary to give *four days'* notice of bail, who are added by a judge's order^c. And as it is an enabling, and not a disabling rule, a *prisoner*, who before might have put in and justified bail upon a *two days'* notice, may still do so^d.

By a general rule of all the courts^e, "if the notice of bail be accompanied by an *affidavit* of justification of each of the bail, according to the form thereto subjoined, and the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if they are rejected, the defendant shall pay the costs of opposition, unless the court, or a judge thereof, shall otherwise order."^f On this rule, which applies equally to *country* as to *town* bail^g, when the bail are allowed to justify after exception, the defendant is in general entitled to the costs of *justification*^h; and when they are rejected, the plaintiff is entitled to the costs of *opposition*, unless the court, or a judge shall otherwise orderⁱ. But in order to obtain the costs of justifying bail, an application should be made at the time of justification^k: And it is discretionary in the courts, under the latter words of the rule, to give or withhold costs, according to circumstances. Where there was a defect in the notice of bail,

Costs of justifying, or opposing bail.

^a *Goddard v. Jarvis*, 9 Bing. 88. 2 Crompt. M. & R. 598. S. C. *per Gurney*, B.

^b *Jenkins v. Maltby*, 2 Crompt. & J. 124.

^c *Perry's bail*, 2 Crompt. & J. 475. 1 Dowl. Rep. 564. S. C. and see *Bowman v. Russel*, 2 Tyr. Rep. 745.

^d *Davies v. Grey*, 2 Crompt. & J. 309. 2 Tyr. Rep. 277. S. C.; and see *King's bail*, 1 Dowl. Rep. 509. *per Littledale*, J.

^e R. T. 1 W. IV. reg. I. § 3. 2 Barn. & Ad. 788. 7 Bing. 783. 1 Crompt. & J. 470. and see *Tidd Prac.* 9 Ed. 271.

^f For the form of an affidavit, to obtain costs of justification on this rule, see *Chit. Pr. Append.* 334.

^g *Grant's bail*, 3 Dowl. Rep. 165. 1

^h *Weemys v. Pearce*, 1 Price, N. R. 151. Anon. 1 Dowl. Rep. 160. 3 Leg. Obs. 408. S. C. *Evans' bail*, 1 Dowl. Rep. 384. 4 Leg. Obs. 267, S. C. *per Taunton*, J. and see *Johnson's bail*, 1 Dowl. Rep. 514. 5 Leg. Obs. 94. S. C. *per Littledale*, J. *Bowman v. Russel*, 2 Tyr. Rep. 744. *Smith v. Bell*, 6 Leg. Obs. 156. *per Patteson*, J. *Grant's bail*, 1 Crompt. M. & R. 598. 5 Tyr. Rep. 227. 3 Dowl. Rep. 165. S. C.

ⁱ *Topham v. Calvert*, 1 Price N. R. 140, 41. and see *Pitt v. Perry*, *id.* 171.

^k *Fream v. Best*, 2 Dowl. Rep. 590. 9 Leg. Obs. 61. S. C. *per Patteson*, J.

and further time was given to inquire after them, and they ultimately justified, the defendant was holden not to be entitled to the costs of justification ^a. So, if the defendant give a second, or amended notice of bail, after a first accompanied by *affidavit* of justification, the second notice must also, it seems, be accompanied by such *affidavit*, to entitle him to the costs occasioned by an unsuccessful opposition ^b. So, where the notice of bail was accompanied by a writing, which purported to be made by both the bail, but which, on examination, was evidently not the original affidavit, nor was it headed "copy," nor was anything stated on the face of it to shew that it was a copy, the court, under these circumstances, disallowed the costs of justification ^c. So, where the *affidavit* of justification stated the bail to be *possessed* of, instead of *worth* the required sum, it was holden that the defendant was not entitled to the costs of justification ^d. And they were not allowed in a subsequent case ^e, where the *affidavit* of justification described the bail as of a particular place, but did not go on to state that he had *resided* there.

Other decisions
thereon.

If bail are opposed on the ground of the *affidavit* of justification being defective, in not swearing that they are *worth* the requisite amount, but it appears that the bail are in fact sufficient, and afterwards justify, the defendant will not receive the costs of justifying; but he will not pay the costs of opposing ^f. When bail, however, cannot justify, in respect of the property described in the *affidavit* of justification, but are allowed to pass, on justifying for other property, the plaintiff is entitled to the costs of the opposition ^g. So, where a notice of bail did not state the numbers of the houses where the bail resided, the plaintiff, upon that ground, although the bail had been found, and proved to be sufficient, had the costs of his appearance to oppose them ^h. And where the justification of bail was opposed, on

^a Anon. 1 Dowl. Rep. 127. 3 Leg. Obs. 327. S. C.; and see Thomson's (or Thompson's) bail, 1 Dowl. Rep. 497. 5 Leg. Obs. 225. 2 Moore & S. 360. (a.) S. C. *per Littledale*, J.

^b Terry v. Pearce, 1 Price N. R. 141, 2. Anon. 3 Leg. Obs. 98. S. C.

^c West v. Williams, 3 Barn. & Ad. 345. 1 Dowl. Rep. 162. 3 Leg. Obs. 265. S. C. De Bode's bail, 1 Dowl. Rep. 368. 4 Leg. Obs. 237. S. C. *per Taunton*, J. but see Smith v. Bell, 6 Leg. Obs. 156. *per Patteson*, J.

^d Thompson's (or Thomson's) bail, 2 Dowl. Rep. 50. 6 Leg. Obs. 59. S. C.

per Gurney, B.; and see Popjoy's bail, 1 Crompt. M. & R. 594. Saunders v. Popjoy, 5 Tyr. Rep. 196. S. C.

^e Heald's bail, 3 Dowl. Rep. 423. 9 Leg. Obs. 318. 5 Tyr. Rep. 231. S. C.; and see Smith's bail, 13 Leg. Obs. 44, 5.

^f Popjoy's bail, 1 Crompt. M. & R. 594. 3 Dowl. Rep. 170. 9 Leg. Obs. 253, 4. S. C. *per Parke*, B.

^g Jackson's bail, 1 Dowl. Rep. 172. 3 Leg. Obs. 281. S. C. Hemming v. Blake, 1 Dowl. Rep. 179. 3 Leg. Obs. 376. S. C.

^h Innis (or Muir) v. Smith, 2 Crompt. & J. 634. 2 Tyr. Rep. 742. S. C.

a strong *affidavit* against the sufficiency of one of them, who was notwithstanding admitted to justify, the court, in the exercise of their discretionary power, ordered that the costs should abide the event, as costs in the cause^a. When bail are *rejected*, the costs of opposing them are granted as a matter of course to the plaintiff, unless some very strong grounds be shewn, on the part of the defendant, for putting in bail who could not justify^b. And before a defendant, who is a prisoner, can justify bail, after a previous rejection, he must deposit or pay the costs of it; and his being a prisoner does not free him from his liability to pay costs of an ineffectual attempt to justify^c. But where bail were rejected, on the ground of a defect in the affidavit of justification, in omitting to describe the bail as housekeepers or freeholders, the court refused to allow the plaintiff the costs of his opposition, or of the opposition to a former justification, on the ground of a defective notice^d. And, in general, it seems the costs of opposing bail will not be allowed, where they have been rejected on purely technical grounds^e.

When bail are rejected.

In the King's Bench, the recognizance of bail by *bill*, was formerly entered by the plaintiff's attorney, after the declaration, with a *memorandum* of the term it was of^f; but by *original*, it was entered by the *filacer*, after a recital of the process^g: And in that court, the practice was always to enter it as taken in court, though it were actually taken by a judge at his chambers^h, or by a commissioner in the country; neither was it a record till entered^h. In the Common Pleas, the *filacer* entered the recognizance on the roll, and docketed it: And in that court, when it was taken by a judge in his chamber, or by a commissioner in the country, it might have been entered specially; it being a record immediately upon the first caption, and bound the lands, before it was filed at *Westminster*ⁱ. But now the defendant, in bailable actions, being brought into court under a writ of

Entry of recognizance on roll.

^a Paine v. Munton, 1 Price N. R. 168. § 41.

² Tyr. Rep. 162. S. C.

^b Evans' bail, 1 Dowl. Rep. 384. 4 Leg. Obs. 267, 8. S. C. per Taunton, J.

^c Pasmore's bail, 3 Dowl. Rep. 214. 9 Leg. Obs. 252. S. C.

^d Kibble v. Thorburn, 2 Moore & S. 359. Beal's bail, 3 Dowl. Rep. 708. 10 Leg. Obs. 253. S. C.

^e Hanwell's bail, 3 Dowl. Rep. 425. 9 Leg. Obs. 318. S. C.

^f R. E. 5 Geo. II. reg. 3. a. K. B. Append. to Tidd Prac. 9 Ed. Chap. XII.

^g Append. to Tidd Prac. 9 Ed. Ch. XII. § 42. *Id. a. b. c.*

^h Shuttle (or Chetley) v. Wood, 2 Salk. 564. 600. 659. 6 Mod. 42. S. C. Anon. *id.* 132. Anon. 7 Mod. 120, 21.; and see Coxeter v. Burke, 5 East, 461. 2 Smith R. 14. S. C. Tidd Prac. 9 Ed. 277, 8.

ⁱ *Id. ib.* and see Rex v. Bingham, 3 Younge & J. 101. 105. 111, 12. 1 Cromp. & J. 245. S. C. in error; and see Tidd Prac. 9 Ed. 278. Append. thereto, Chap. XII. § 45. *id.* § 42. c.

capias, the entry of the recognizance begins, in all the courts, with a statement of such writ, setting it out in *hæc verba*; after which the recognizance is entered, in the King's Bench, as was usual in actions by *bill* in that court; and in the Common Pleas and Exchequer, in the way formerly used in those courts.

Liability of bail.

In the King's Bench, where the plaintiff declared for or recovered a greater sum than was expressed in the process upon which he declared, the bail were not discharged; but were liable for so much as was sworn to, and indorsed on the process, or for any less sum which the plaintiff in such action should recover^a, together with the costs of the original action^b; and there was no distinction in practice between actions commenced by *bill*, and by *original writ*: but the court, in either case, would have entered an *exoneretur* on the bail-piece, on payment of the sum sworn to and costs, though less than the sum acknowledged to be due^c. And the liability of the bail, for the costs of the original action, was limited, so that upon the whole they were not liable for more than double the sum sworn to, and the costs of the action on the recognizance^d. In the Common Pleas, each of the bail was separately liable for the sum recovered, to the full extent of the penalty of the recognizance, being double the amount of the sum sworn to, or indorsed on the writ under a judge's order^e. In the Exchequer, it was a rule^f, that "upon a recognizance of bail, in any action brought in that court, the bail therein were not jointly or severally liable in such action, for more in the whole than the amount of the sum sworn to in the affidavit of the cause of action, together with the costs of such action, unless any proceedings were had upon their recognizance, in which case they would also be subject to such other costs as they were by law liable to." And, by a general rule of all the courts^g, "bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit; not exceeding in the whole the amount of their recognizance." Upon

^a R. E. 5 Geo. II. reg. II. K. B. Anon. Lofft, 545. Jackson v. Hassell, Doug. 330. Stevenson v. Cameron, 8 Durnf. & E. 28, 9. Clarke v. Bradshaw, 1 East, 90. Wheelwright v. Simons, 5 Maule & S. 511.

^b Tidd Prac. 9 Ed. 280. (h.)

^c Jacob v. Bowes (or Bowen) 6 East, 312. 2 Smith R. 402. S. C. Wheelwright v. Simons, 5 Maule & S. 511.

^d Blaney v. Holt, 5 Barn. & Ad. 241. 3 Nev. & M. 529. S. C.

^e Calveraq v. De Miranda, Barnes, 76. Dahl v. Johnson, 1 Bos. & P. 205.; and see Wheelwright v. Simons, 5 Maule & S. 511. Howell v. Wyke, 4 Moore, 167. 1 Brod. & B. 490. S. C. Tidd Prac. 9 Ed. 280, 81.

^f R. H. 38 Geo. III. in Scac. Man. Ex. Append. 223. 8 Price, 502.

^g R. H. 2 W. IV. reg. I. § 21. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Crompt. & J. 173, 4.

this rule, it has been holden, in the Common Pleas, that the two bail are, both together, not liable beyond the amount specified in the recognizance^a.

In the King's Bench, bail, who had been rejected, were still competent to render the defendant, so long as they remained on the bail-piece^b; though it was otherwise in the Common Pleas, where they must have entered into a fresh recognizance, before they could have rendered the defendant^c: But, by a general rule of all the courts^d, "bail, though rejected, shall be allowed to render the principal, without entering into a fresh recognizance." Formerly, when the plaintiff proceeded by *scire facias* against the bail on their recognizance, the render might have been made, in the King's Bench, at any time before the rising of the court, on the return day of the second *scire facias*, or of the first, when *scire feci* was returned, by bill^e; or, by *original* in that court, as well as in the Common Pleas, at any time before the rising of the court on the appearance day, or *quarto die post*, of the return of the second *scire facias*^f, or of the first, when *scire feci* was returned^g, and not after^h.

When the plaintiff proceeded by action of *debt* on the recognizance, the render might formerly have been made, in the King's Bench, by the space of *eight* entire days in full term, next after the return of the *latitat*, or other process against the bailⁱ. And an intervening *Sunday* was reckoned as one of the *eight* days, allowed for rendering the defendant^k. If there were not the full number of days in the same term, they must have been made up in the following one: and if an action were brought in the King's Bench, against bail, on a re-

Render of principal, by rejected bail, without entering into fresh recognizance.

Time allowed for render, when plaintiff proceeds by *scire facias*.

By action of debt on the recognizance, in K. B.

^a Vansandau v. Nash, 10 Bing. 329. 3 Moore & S. 834. 2 Dowl. Rep. 767. S. C.

^b Per Cur. E. 40 Geo. III. K. B. 6 Maule & S. 218. 1 Chit. R. 448. (a.)

^c Bell v. Gate, 1 Taunt. 163, 4. per Heath, J.; and see 3 Moore, 240. (a.) 1 Chit. R. 446. (a.) Tidd Prac. 9 Ed. 275. 281, 2.

^d R. H. 2 W. IV. reg. I. § 20. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Crompt. & J. 173.

^e Wilmore v. Clerk, 1 Ld. Raym. 157. Anon. 6 Mod. 238. Anon. 8 Mod. 340. R. T. 1 Ann. reg. II. (a.) R. E. 5 Geo. II. reg. III. (a.) K. B.; and see John-

son v. Lindsay (or Linsay), 1 Barn. & C. 247. 2 Dowl. & R. 385. S. C.

^f Simmonds v. Middleton, 1 Wils. 270.

^g Bailey v. Smeathman, 4 Bur. 2134.

^h Hunt v. Cox (or Cox) 3 Bur. 1360. 1 Blac. Rep. 393. S. C. Sainsbury v. Pringle, 10 Barn. & C. 751. 753. K. B. R. M. 1654. § 12. (a.) Vanderesh v. Waylet, Cas. Pr. C. P. 53. Derisley v. Deland, Barnes, 82. Lardner v. Bassage, 2 H. Blac. 593. C. P.

ⁱ R. T. 1 Ann. reg. 1 K. B. Anon. 1 Salk. 101. Milner v. Petit, 1 Ld. Raym. 721. Anon. 6 Mod. 132.

^k Creswell v. Green, 14 East, 537.

cognizance taken in the Common Pleas, they had the same time allowed them for rendering the principal, as if the recognizance had been taken in that court^a. Where an action had been commenced, and was afterwards discontinued, and then the bail rendered the principal before the bringing of a new action, the court held the render to be good, it being before the return of the process in that suit; and it was the fault of the plaintiff, not to begin right at first^b. So, where the plaintiff sued the bail on their recognizance, who did not render the principal within *eight* days, and then the plaintiff died, and his executors brought another action against the bail, it was ruled, that the bail had *eight* days from the return of the process in the second action, to render the principal^c. In the Common Pleas, the render must formerly have been made before the rising of the court^d, on the *quarto die post* of the return of the process^e, which must have been served on the bail *four* days at least before the return^f. And in that court, they were allowed the same time for rendering the defendant, on an attachment of privilege, as on a common *capias*^g. And if a bail had been served with process on his recognizance, and died before the *quarto die post*, and fresh process issued against his executors, they had until the *quarto die post* of the return of the second writ, to surrender the principal^h. In the Exchequer, only *four* days were allowed the bail to surrender their principal, when the plaintiff proceeded by *subpoena*ⁱ; though *eight* days were allowed, when the proceeding was by *quo minus*^k. In calculating the *four* days, one was reckoned *inclusive*, and the other *exclusive*^l: And if an action were brought in that court, against bail upon their recognizance, entered into in the King's Bench, they must have rendered their principal, as if the recognizance had been taken in the

In C. P.

In Exchequer.

^a Fisher v. Branscombe, 7 Durnf. & E. 355.

^b Hoare v. Mingay, 2 Str. 915.

^c Wilkinson v. Vass, 8 Durnf. & E. 422. and see Tidd Prac. 9 Ed. 283, 4.

^d Vanderesh v. Waylet, Cas. Pr. C. P. 53. Derisley v. Deland, Barnes, 82. Lardner v. Bassage, 2 H. Blac. 593.; but see R. H. 2 W. IV. reg. 1. § 22. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Cromp. & J. 174. Tidd Prac. 9 Ed. 283.

^e R. M. 1654. § 12. C. P. Fletcher v. Aingell, 2 H. Blac. 118.

^f Wright v. Dixon, Cas. Pr. C. P. 18.

Flanagan v. Adey, Pr. Reg. 83. Martin v. Price, Barnes, 62. Mackenzie v. Martin, 6 Taunt. 286.

^g Fletcher v. Aingell, 2 H. Blac. 117.

^h Meddowcroft v. Sutton, 1 Bos. & P. 61. and see Tidd Prac. 9 Ed. 284.

ⁱ Bennett v. Forester, 2 Price, 296. Dibbins v. Taylor, 1 Younge & J. 15.

^k Rolfe v. Cheetham, Wightw. 79. Waring v. Jervis, 5 Price, 170. Dibbins v. Taylor, 1 Younge & J. 15. and see Edwards v. Jameson, Forrest, 26.

^l Bennett v. Forester, 2 Price, 296. n.

Exchequer^a: But now, by a rule of all the courts^b, "where the plaintiff proceeds by action of *debt* on the recognizance of bail, in any of the courts at *Westminster*, the bail shall be at liberty to render their principal, at any time within the space of *fourteen* days next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed, upon payment of the costs of the writ, and service thereof only." And, by a previous rule of all the courts^c, "bail shall be at liberty to render the principal, at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night." In all the courts.

On last day.

By the administration of justice act^d, "a defendant who shall have been held to bail upon any *mesne* process, issued out of any of his Majesty's superior courts of record, may be rendered in discharge of his bail, either to the prison of the court out of which such process issued, according to the practice of such court, or to the common gaol of the county in which he was so arrested: and the render to the county gaol, shall be effected in the manner following; that is to say, the defendant, or his bail, or one of them, shall, for the purpose of such render, obtain an *order* of a judge of one of his Majesty's superior courts at *Westminster*^e, and shall lodge such order with the gaoler of such county gaol; and a *notice* in writing of the lodgment of such order, and of the defendant being actually in custody of such gaoler, by virtue of such order^f, signed by the defendant, or the bail, or either of them, or by the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent; and the sheriff, or other person responsible for the custody of debtors in such county gaol, shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such." Render in discharge of bail, how made, when defendant is at large.

When the defendant was in custody on *civil* process, there must formerly have been a *habeas corpus cum causa*, for bringing him up, in order to render him in discharge of his bail; which writ might have been issued in term or vacation, returnable *immediatè*^g; and The like, when defendant is in custody, in another action.

^a *Dibbins v. Taylor*, 1 Younge & J. 15. and see *Tidd Prac.* 9 Ed. 284.

^b *R. Trin. Vac.* 17 June, 1833. 5 Barn. & Ad. 468. 2 Nev. & M. 288. 2 Dowl. Rep. 397. 3 Moore & S. 560. 10 Bing. 154. 1 Crompt. & M. 866. 3 Tyr. Rep. 986. 6 Leg. Obs. 158.

^c *R. H.* 2 W. IV. reg. I. § 22. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Crompt. & J. 174.

^d 11 Geo. IV. & 1 W. IV. c. 70. § 21.

^e *Append. to Tidd Sup.* 1830. p. 209.

^f *Id.* 210.

^g *Bettesworth v. Bell*, 3 Bur. 1875.

the judge, on the defendant's being brought up, would either have committed him to the custody of the marshal of the King's Bench, or warden of the *Fleet*, in the Common Pleas and Exchequer, or remanded him to his former custody: But now, by another clause in the administration of justice act^a, "a defendant also shall hereafter "be in custody of the gaoler of the county gaol of any county in "England, or in the principality of Wales, by virtue of any proceeding out of any of his Majesty's superior courts of record, may "be rendered in discharge of his bail, in any other action depending "in any of the said courts, in the manner thereinbefore provided for "a render in discharge of bail^b; and the keeper of such gaol, or "such sheriff, or other person responsible for the custody of debtors "as aforesaid, shall, on such render, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly "exonerated from liability as such."^c

Render to county gaol, when defendant is at large, in Exchequer.

In the Exchequer of Pleas, there is a rule^d, founded on the above clause, by which it is ordered, that "on application by a defendant or his bail, or either of them, for an order^e of one of the barons of this court, to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested; which facts shall be stated in the order^e: and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody, in discharge of the bail: and that on such lodgment and render, a notice^f thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent; and thereupon the bail for such defendant shall be wholly exonerated, without entering an *exoneretur*." On this rule, where a sheriff had put in bail above, in order to render, and had obtained a judge's order for rendering, at the instance of himself and the bail, which order was signed by the sheriff's attorney, instead of the defendant or his bail, or their attorney, the court would not rescind the order,

^a 11 Geo. IV. & 1 W. IV. c. 70. § 22.

^b Append. to Tidd *Sup.* 1830. p. 209, 10.

^c For the form of an *affidavit* of render, &c. for entering an *exoneretur*, see Append. to Tidd *Sup.* 1830. p. 210.

^d R. M. 1 W. IV. reg. II. § 12. 1 *Crompt. & J.* 279, 80. 1 *Tyr. Rep.* 162. and see Tidd *Prac.* 9 Ed. 285, 6.

^e Tidd *Sup.* 1830. p. 209.

^f *Id.* 210.

which they said might be amended, by striking out all that shewed it to be granted at the sheriff's instance ^a. And, by another rule of the same court ^b, "if a defendant shall be in custody of the gaoler of the county gaol of any county in *England* or *Wales*, by virtue of any process issued out of any of his Majesty's superior courts of record, he may be rendered in discharge of his bail, in any action depending in this court, in like manner as is hereinbefore provided for a render in discharge of bail; and thereupon the bail shall be wholly exonerated from liability as such bail."

The like, when defendant is in custody.

In the King's Bench, when the plaintiff declared by *original*, in a different county from that into which the writ issued, his bail were discharged ^c; but, in the King's Bench by *bill*, or in the Common Pleas ^d, this variance was not deemed material: And now, by a general rule of all the courts ^e, "a declaration laying the venue in a different county from that mentioned in the process, shall not be deemed a waiver of the bail." The bail are in general discharged, if the plaintiff declare against the defendant, for a different cause of action from what is expressed in the process ^f. But, in the Common Pleas, a variance between the writ and count, (the *ac etiam* being in *case* on promises, and the declaration in *debt*,) was not formerly deemed a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to was under 40*l.* ^g And, by a general rule of all the courts ^h, "a variance between the *ac etiam* and the declaration, where the defendant is arrested, shall not be deemed ground for discharging the defendant, or the bail; but the bail-bond, or recognizance of bail, shall be taken with a penalty or sum of *forty* pounds only." This rule, however, has become obsolete since the uniformity of process act, by which the *ac etiam* clause, in bailable writs, is abolished.

Bail not discharged, by laying venue in a different county.

Not formerly discharged, by variance between *ac etiam* and declaration.

^a *Green v. Jacobs*, 3 Tyr. Rep. 231.

^b R. M. 1 W. IV. reg. II. § 13. 1 Crompt. & J. 280, 81. 1 Tyr. Rep. 162.

^c *Yates v. Plaxton*, 3 Lev. 235. R. E. 2 Geo. II. (a.) K. B. *Crutchfield v. Sewards*, Barnes, 116.

^d R. H. 22 Geo. III. C. P. and see *Tidd Prac.* 9 Ed. 294. 432.

^e R. H. 2 W. IV. reg. I. § 40. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

^f *Tidd Prac.* 9 Ed. 294. (c.); but see *Ward v. Tummon*, 1 Ad. & E. 619. 4 Nev. & M. 376. S. C., where the court refused to discharge the bail on motion.

^g *Lockwood v. Hill*, 1 H. Blac. 310. and see *Mayfield v. Davison*, 10 Barn. & C. 223. *Tidd Prac.* 9 Ed. 294. 450.

^h R. H. 2 W. IV. reg. I. § 10. 3 Barn. & Ad. 375. 8 Bing. 289. 2 Crompt. & J. 170.

CHAP. XIII.

Of PROCEEDINGS on the BAIL BOND ; and against the SHERIFF, to compel him to RETURN the WRIT, and bring in the BODY.

Proceedings on bail bond, and against sheriff, when special bail is not put in.

At what time bail-bond may be assigned.
Assignment of, by whom made.

Must be made in presence of two credible witnesses.

IF a defendant, having given bail to the sheriff on an arrest, shall omit to put in special bail, as required by the writ of *capias*, the plaintiff may either take an assignment of the bail-bond^a, and proceed thereon against the defendant, and his bail to the sheriff; or he may proceed against the sheriff, to compel him to return the writ^b, and bring in the body of the defendant^b.

The bail-bond, it is said, may be assigned *before* it is forfeited, though it cannot be put in suit till afterwards^c. The assignment may be made by the high sheriff; or by the under-sheriff, in *his* name; or even by the under-sheriff's clerk, in his office^d: and an authority from the sheriff to the under-sheriff, to execute the assignment in his name, need not be shewn; as the latter is possessed of all the authorities belonging to the office^e. But the assignment must be made by the sheriff, in the presence of two *credible* witnesses, which means disinterested persons: and therefore, an assignment of the bail-bond is invalid, if executed in the presence of, and attested by the *plaintiff* in the action, and another person^f. It is not necessary,

^a Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Tidd *Sup.* 1833. p. 274.

^b For the mode of proceeding against the sheriff, to compel him to return the writ and bring in the body, see Tidd *Prac.* 9 Ed. 306, &c.; and as to the mode of setting aside the proceedings for irregularity, or upon terms, see *id.* 316, &c.

^c *Paradice v. Holiday*, Barnes, 77. and see *Alston v. Underhill*, 1 Cromp. & M. 494. 3 Tyr. Rep. 427. S. C.

^d *Per* Ld. Mansfield, Ch. J. in *Harris v. Ashley*, Sit. *Mid.* M. 30 Geo. II. *French v. Arnold*, 5 Geo. III. 1 Str. 60.

(1.) *Middleton v. Sandford*, 4 Campb. 36.; and see *Doe d. James v. Brawn*, 5 Barn. & Ald. 243.; but see *Kitson v. Fagg*, 1 Str. 60. 10 Mod. 288. S. C. *contra*. For the form of the assignment, see Append. to Tidd *Sup.* 1833. p. 283.; and for proceedings thereon against the bail, see Tidd *Prac.* 9 Ed. 297, &c.; and as to the mode of setting aside the same for irregularity, see *id.* 300. or staying them, when regular, upon terms, *id.* 302.

^e *Wright v. Barrack*, 1 Tyr. & G. 764.

^f *White (or Wright) v. Barrack*, 1 Meeson & W. 424, 1 Tyr. & G. 764. S. C.

however, that the witnesses should actually attest the assignment by their signatures, at the time of its execution ^a.

The plaintiff was formerly allowed to take an assignment of the bail-bond, and to proceed thereon, even after service of the rule to bring in the body ^b, or moving for an attachment; but after he had sued out an attachment against the sheriff, it was holden that he had made his election, and could not afterwards, whilst the attachment remained in force, take an assignment of the bail-bond ^c. And as the defendant, after a rule to bring in the body, was allowed the same time to justify bail, as the sheriff had to bring in the body ^d, namely, *four* days in town, and *six* days in country causes, the plaintiff, in the mean time, could not have proceeded on the bond: And accordingly, in the Exchequer of Pleas, it is a rule ^e, that "whenever a plaintiff shall rule a sheriff, on a return of *cepi corpus*, to bring in the body, the defendant shall be at liberty to put in and perfect bail, at any time before the expiration of such rule; and that a plaintiff, having so ruled the sheriff, shall not proceed on any assignment of the bail-bond, until the time has expired to bring in the body as aforesaid:" And, by a general rule of all the courts ^f, "a plaintiff shall not be at liberty to proceed on the bail-bond, pending a rule to bring in the body of the defendant."

Proceeding on bail-bond, pending rule to bring in body.

In the King's Bench, if bail above were not put in and perfected in due time, the plaintiff might immediately have taken an assignment of the bail-bond, and brought an action thereon: But, in the Common Pleas, it was a rule ^g, that "no bail-bond taken in *London* or *Middlesex*, by virtue of any process issuing out of that court, returnable on the *first* return of any term, should be put in suit, until after the *fifth* day in full term; and that no bail-bond taken in

At what time it may be put in suit.

^a Phillips v. Barber, (or Barlow,) 1 Scott, 322. 1 Bing. N. R. 438. 3 Dowl. Rep. 381. 6 Car. & P. 781. 9 Leg. Obs. 317, 18. S. C.

^b Whittle v. Oldaker, 7 Barn. & C. 478. 1 Man. & R. 298. S. C. K. B. Wright v. Walker, 3 Bos. & P. 564. C. P. Brown v. Neave, Wightw. 406. Man. Ex. Pr. 121. Excheq.

^c Cunningham v. Chambers, E. 45 Geo. III. K. B., and see 1 Chit. R. 394, in *notis*.

^d Whittle v. Oldaker, 7 Barn. & C. 478. 1 Man. & R. 298. S. C. K. B. Wright v. Walker, 3 Bos. & P. 564. C. P. Ladd

v. Arnaboldi, 1 Crompt. & J. 281. *Id.* 281, 2, n. 1 Tyr. Rep. 18. S. C. Excheq.; but see Same v. Saine, 1 Crompt. & J. 97. *per* Garrow, B. and Vaughan, B. *contra*.

^e R. M. 1 W. IV. reg. II. § 15. 1 Crompt. & J. 281. 1 Tyr. Rep. 163; and see Tidd *Prac.* 9 Ed. 297.

^f R. H. 2 W. IV. reg. 1. § 23. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Crompt. & J. 174.

^g R. T. 30 Geo. III. C. P. 1 H. Blac. 525, 6.; and see a former rule of H. 9 Ann. reg. IV. C. P. Bellis v. Miford, 2 Blac. Rep. 1009. Tidd *Prac.* 9 Ed. 298, 9.

any other city or county, by virtue of such process, should be put in suit until after the *ninth* day in full term; and that no bail-bond taken in *London* or *Middlesex*, by virtue of any process issuing out of that court, returnable on the *second* or any other subsequent return, should be put in suit, until after the end of *four* days, exclusive of the day on which such process should be expressed to be returnable; and that no bail-bond taken in any other city or county, by virtue of such last-mentioned process, should be put in suit until after the end of *eight* days, exclusive of the day on which such last-mentioned process should be expressed to be returnable; upon pain of having all proceedings upon such bail-bonds to the contrary set aside with costs." And it was a rule in all the courts^a, that "no bail-bond, taken in *London* or *Middlesex*, should be put in suit, until after the expiration of *four* days; nor, if taken elsewhere, till after the expiration of *eight* days, exclusive, from the appearance day of the process." These rules, however, are no longer in force, having been superseded by the uniformity of process act^b; upon which it has been holden, that if a defendant do not put in special bail within *eight* days after the execution of the *capias*, inclusive of the day of execution, the plaintiff may proceed immediately on the bail-bond^c.

Bringing several actions on bail-bond.

It was formerly usual for the plaintiff to bring several actions, against the principal and his bail, upon the bail-bond; but this practice being considered unnecessary and oppressive, was discountenanced by the courts: And where the assignee of a bail-bond brought separate actions thereon, without suggesting any sufficient reason for so doing, the court of King's Bench, under the discretionary power vested in them by the statute 4 & 5 Ann. c. 16. § 20, stayed the proceedings in all the actions, upon payment of the costs of one of them^d: And now, by a general rule of all the courts^e, "proceedings on the bail-bond may be stayed, on payment of costs in one action, unless sufficient reason be shewn for proceeding in more." But where several actions are brought on the same bail-bond, it is too late, after verdict, to move to stay proceedings, on payment of the costs of one action only^f: And where two of three

^a R. H. 2 W. IV. reg. I. § 24. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Crompt. & J. 174, 5.

^b 2 W. IV. c. 39.

^c *Hillary v. Rowles*, 2 Dowl. Rep. 201. 5 Barn. & Ad. 460. S. C.; and see *Alston v. Underhill*, 2 Dowl. Rep. 26.

^d *Key v. Hill*, 2 Barn. & Ald. 596. 1

Chit. R. 337. S. C.; and see *Tidd Proc.* 9 Ed. 300.

^e R. H. 2 W. IV. reg. I. § 30. 3 Barn. & Ad. 378. 8 Bing. 292. 2 Crompt. & J. 176.

^f *Johnson v. Macdonald*, 2 Dowl. Rep. 44. 6 Leg. Obs. 58, 9. S. C. Excheq.

parties to a bail-bond were sued jointly, this was holden to be no irregularity ^a.

The action by the *assignee*, upon the bail-bond, must necessarily be brought in the *same* court whence the process issued, on which the bond was taken ^b; otherwise the parties could not have the relief intended them by the statute 4 & 5 Ann. c. 16. § 20. A similar rule was applied, in the King's Bench, to actions brought on the bail-bond by the *sheriff* himself, as well as his *assignee* ^c; but it was otherwise in the Common Pleas ^d, and Exchequer ^e; where the sheriff was allowed to sue on a bail-bond, in a different court. And, by a general rule of all the courts ^f, "an action may be brought upon a bail-bond, by the *sheriff* himself, in any court." In the Common Pleas, though it was formerly usual to sign judgment, on staying proceedings in an action on the bail-bond, when the bail consented that it should stand as a security, and execution only was stayed ^g, yet it was afterwards holden, that the bail in such case were at liberty to plead to the action on the bail-bond; and consequently were entitled to a rule to plead, and demand of plea, before judgment could be signed against them ^h. But now, by a general rule of all the courts ⁱ, "in all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it."

Action thereon may be brought by sheriff, in any court.

Signing judgment therein.

The writ of *summons*, we have seen ^k, must be returned by the plaintiff, or his attorney; but the writs of *distringas* and *capias* are to be returned by the sheriff, or other officer to whom they are directed; and the writ of *detainer*, by the marshal of the King's Bench, or warden of the Fleet prison. The writ of *distringas* should be returned, on the day on which it is made returnable ^l; and the writ of *capias*, immediately after the execution thereof ^m; or, if the same shall remain

Writ of summons, &c. by whom to be returned.

Writ of *distringas*, &c. when to be returned.

^a Knowles v. Johnson, 2 Dowl. Rep. 175.
653. *per Parke*, B.

^b Chesterton v. Middlehurst, 1 Bur. 642. 2 Ken. 369. S. C. Walton v. Bent, 3 Bur. 1923. Francis v. Taylor, Barnes, 92. How v. Bridgewater, *id.* 117. Morris v. Rees, 3 Wils. 346. 2 Blac. Rep. 838. S. C.

^c Donatty v. Barclay, 8 Durnf. & E. 152.

^d Newman v. Faucitt, 1 H. Blac. 631.

^e Yorke v. Ogden, 8 Price, 174; and see Tidd *Prac.* 9 Ed. 300.

^f R. H. 2 W. IV. reg. I. § 28. 3 Barn. & Ad. 777. 8 Bing. 292. 2 Crompt. & J.

^g Otway v. Cockayne, Barnes, 85.

^h Evans v. Surman, 1 New Rep. C. P. 68; and see Tidd *Prac.* 9 Ed. 304, 5.

ⁱ R. H. 2 W. IV. reg. I. § 29. 3 Barn. & Ad. 377, 8. 8 Bing. 292. 2 Crompt. & J. 176.

^k *Ante*, 17.

^l Sched. to stat. 2 W. IV. c. 39. No. 3. Append. to Tidd *Sup.* 1833, p. 268. *Ante*, 80.

^m Sched. to stat. 2 W. IV. c. 39. No.

4. Append. to Tidd *Sup.* 1833, p. 272. *Ante*, 84, 5. 128.

unexecuted, then at the expiration of *four* calendar months from the date thereof, or sooner, if the sheriff, &c. shall be thereto required, by order of the court or a judge ^a. And if the plaintiff mean to proceed to outlawry, before the expiration of the *four* months, the practice is to go before a judge, with an *affidavit* that the defendant cannot be found, and thereupon to obtain an order, giving the sheriff leave to return *non est inventus* ^b. But there is a *proviso* in the statute 2 W. IV. c. 39. ^c that "no writ of *capias* or *distringas* shall be sufficient, for the purpose of "outlawry or waiver, if the same be returned within less than *fifteen* "days after the delivery thereof to the sheriff, or other officer to "whom the same shall be directed:" and "no first writ shall be "available, to prevent the operation of the statute of limitations, "unless such writ, and every writ, if any, issued in continuation of a "preceding writ, shall be returned *non est inventus*, and entered of record, within *one* calendar month next after the expiration thereof, "including the day of such expiration ^d; such return to be made, in "bailable process, by the sheriff or other officer to whom the writ "shall be directed, or his successor in office; and, in process not "bailable, by the plaintiff, or his attorney, suing out the same, as the "case may be." ^d

Rule, or order,
to return writ.

The mode of proceeding against the sheriff, to compel him to return the writ and bring in the body, is by rule of court in *term* time; or by judge's order in *vacation*, on the statute 2 W. IV. c. 39. § 15. The rule to return the writ is a side bar, or treasury rule ^e; which may be obtained, in term time, from the clerk of the rules in the King's Bench, or from the *filazer*, in the Common Pleas and Exchequer ^e; and, by a general rule of all the courts ^f, it may be obtained on the *last*, as well as on any other day in term. This rule expires in *four* days after service, in *London* or *Middlesex*; and formerly expired in *six* days, in any other city or county ^g: But, by a general rule of all the courts ^h, it is ordered, that "all rules upon sheriffs, other than the sheriffs of *London* and *Middlesex*, to return writs, either of *mesne* or *final* process, and rules to bring in the bodies of defendants, be *eight* day rules, instead of *six* day rules."

^a Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Tidd *Sup.* 1833, p. 272. *Ante*, 89, 90, 97.

^b *Lewis v. Davison*, 3 Dowl. Rep. 275.

^c 1 Crompt. M. & R. 658. 5 Tyr. Rep. 198. S. C.

^d § 5. *Ante*, 93, 4.

^e Stat. 2 W. IV. c. 39. § 10. *Ante*, 16,

17.

^e Tidd *Prac.* 9 Ed. 484. And for the form of the rule to return the writ, see Append. to Tidd *Sup.* 1833, p. 233.

^f R. H. 2 W. IV. reg. I. § 96. 3 Barn. & Ad. 368. 8 Bing. 303. 2 Crompt. & J. 196.

^g Tidd *Prac.* 9 Ed. 307.

^h R. M. 7 W. IV. 13 Leg. Obs. 25.

The writ should regularly be returned by the sheriff, on the day on which the rule for returning it expires, if in *term*; but when the rule expired in *vacation*, the sheriff, in the King's Bench, need not formerly have returned it till the *first* day of the ensuing term, and had the whole of that day to file his return^a. In the Common Pleas, the sheriff, in such case, must have filed his return in *vacation*, and could not have waited till the ensuing term; the Common Pleas office being supposed to be always open^b: and this was also the practice in the Exchequer^c: But, by a general rule of all the courts^d, "when the rule to return the writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall open:" and, by another rule^e, "the officer with whom it is filed, shall indorse the day and hour when it was filed."

Time allowed for return, when rule expires in vacation.

Filing writ.

Indorsement thereon.

At length, as proceedings may now be had, except at certain times, in term or vacation, it was enacted by the statute 2 W. IV. c. 39^f, that "it shall be lawful, in *term* time, for the court out of which any writ issued by authority of that act, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit*, shall have issued, to make rules, and also for any judge of either of the said courts, in *vacation*, to make orders, for the return of any such writ; and every such order shall be of the same force and effect, as a rule of court made for the like purpose: Provided always, that no attachment shall issue for disobedience thereof, until the same shall have been made a rule of court." And, by a general rule of all the courts^g, "in case a judge shall have made an order in *vacation*, for the return of any writ issued by authority of the said act, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit*, on any day in *vacation*, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of court in the term then next following, it shall not be necessary to serve such rule of court, or make any fresh demand of performance thereon; but an attachment shall issue forthwith, for disobedience of such order, whether the thing required by such order, shall or shall not have been

Rules and orders for return of writs, by court in term time, or judge in vacation.

Attachment for disobedience of judge's order, when made in vacation.

^a Rex v. Sheriff of Berks, 5 East, 386. Cromp. & J. 171.

1 Smith R. 427. S. C.

^b Id. § 12. 3 Barn. & Ad. 376. 8 Bing.

^c Rex v. Sheriff of Middlesex, in Thompson v. Powell, 5 Taunt. 647. 1 Marsh. 270. S. C.

290. 2 Cromp. & J. 171.

^d § 15. and see Tidd Prac. 9 Ed. 306, &c.

^e Smith v. Blyth, 9 Price, 255.

^f R. M. 3 W. IV. reg. 13. 4 Barn.

^g R. H. 2 W. IV. reg. 1. § 11. 3 Barn. & Ad. 376. 8 Bing. 289, 90. 2

& Ad. 4. 9 Bing. 446, 7. 1 Cromp. & M. 5.

Affidavit for obtaining judge's order.

Proceedings thereon.

done in the mean time." An *affidavit* of facts must be made, on the above rule, and submitted to the judge, for the purpose of obtaining an order to return the writ in vacation^a; which order must be duly served on the undersheriff^b. And where a judge's order to return the writ is made in vacation, if the sheriff do not make the return by the time limited, an attachment may be obtained against him, on the *first* day of the next term, on the usual *affidavit* of service of the rule^c, or order^d, and that the writ was not filed by the time therein limited; but the order must first be made a rule of court, though such rule need not be served; and the return of the writ, after the time limited by the order, will not clear the sheriff's contempt, or prevent the attachment from issuing^e. The sheriff is bound to pay the necessary fee for opening the treasury during vacation, in order to file his return^f. And, in the King's Bench^g and Exchequer^h, a judge's order made in vacation, pursuant to the above rule, requiring the sheriff to bring the defendant into court, &c. may be made a rule of court, and an attachment may issue for not obeying the order, on one motionⁱ: but the practice is otherwise in the Common Pleas^j, and, in the King's Bench, it seems to be necessary, that there should be a separate rule for each^k. An attachment having issued against a sheriff, for having, by mistake, omitted to return a *capias*, pursuant to a baron's order, in vacation, under the general rule of M. 3 W. IV. *reg.* 13, till half an hour after the opening of the office on the day after the proper return day, the court set it aside, though bail above were not perfected, on payment of costs, and of such further damages, if any, as the master might find the plaintiff to have sustained from the sheriff's omission^l: And where a plaintiff intends to make a sheriff liable for damages occasioned by his not having returned a

^a Append. to Tidd *Sup.* 1833, p. 284.

^b Chapm. K. B. 2 *Addend.* 70. and see Chit. Archb. Pr. 138.

^c Append. to Tidd *Sup.* 1833, p. 284.

^d *Id.* 285; And for the form of a rule for an attachment, for not returning the writ, see *id.* *ib.*

^e Chapm. K. B. 2 *Addend.* 69, 70.

^f *Rex v. Sheriff of Surrey*, 3 Dowl. Rep. 82.

^g *Hinchliffe (or Hunchliff) v. Jones*, 4 Dowl. Rep. 86. 1 Har. & W. 337. 10 Leg. Obs. 475. S. C.; but see *Stainland v. Ogle*, 3 Dowl. Rep. 99. *Frost v. Green*,

10 Leg. Obs. 61. *per Littledale, J. contra.*

^h *Howell v. Bulteel*, 2 Crompt. & M. 339. 3 Dowl. Rep. 99. (a). *Kensit v. Bulteel*, 4 Tyr. Rep. 59. S. C. *Forster v. Kirkwall*, 4 Dowl. Rep. 370. 11 Leg. Obs. 471. S. C.

ⁱ *Pilcher (or Fitcher) v. Woods*, 4 Dowl. Rep. 329. 11 Leg. Obs. 310. S. C.

^j *Hinchliffe (or Hunchliffe) v. Jones*, 4 Dowl. Rep. 86. 1 Har. & W. 337. 10 Leg. Obs. 475. S. C.

^k *Rex v. Sheriff of Essex*, in *Fitch v. Courtensy*, 1 Tyr. & G. 629.

writ of *capias* in proper time, he should, if in vacation, give him notice of his intention, and will then be entitled to recover all such damages as occur between his giving such notice, and receiving information from the sheriff, that the defect is cured ^a.

The returns commonly made by the sheriff, to the writ of *distringas*, are either that he has distrained upon the goods and chattels of the defendant, for the sum of 40*s.* in order to compel his appearance in court, to answer the plaintiff, &c. and that he did, at the time of executing the writ, personally serve the defendant with a true copy thereof, and the notice subscribed thereto, and indorsements thereon ^b; or that the defendant is not found in his bailiwick, and hath no goods or chattels therein, by which he can be distrained ^c: and, upon the *capias*, the common returns are either *cepi corpus* ^d, or *non est inventus* ^e; or, on a writ of *capias* against several defendants, the sheriff may return *cepi corpus* as to one defendant, and *non est inventus* ^f, or service of the copy of a writ ^g, as to another.

Upon the sheriff's return of *cepi corpus*, to a writ of *capias*, if bail above be not duly put in, or, if put in and excepted to, they do not justify in due time, the plaintiff may proceed against the sheriff, by rule of court in *term* time, or by judge's order in *vacation*, to bring in the body ^h: And, by a general rule of all the courts ⁱ, "in case a rule of court, or judges' order, for returning a bailable writ of *capias*, shall expire in vacation, and the sheriff or other officer, having the return of such writ, shall return *cepi corpus* thereon, a judge's order ^k may thereupon issue, requiring the sheriff, or other officer, within the like number of days after the service of such order, as by the practice of the courts is prescribed, with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action: and if the sheriff, or other officer, shall not duly obey such order, and the same shall have been made a rule of court in the term next following, it shall not be necessary to serve such rule of court, or to make any fresh demand there-

Returns to writ of *distringas*.

To writ of *capias*.

Rule, or order, to bring in body.

Judge's order, in vacation.

^a *Rex v. Sheriff of Essex*, in *Fitch v. Courtenay*, 1 Tyr. & G. 629. and see *Brown v. Jarvis*, 13 Leg. Obs. 45.

^b *Append. to Tidd Sup.* 1833, p. 285.

^c *Id. ib.*

^d *Id. ib.*

^e *Id.* 286.

^f *Id.* 285.

^g *Id.* 286.

^h *Tidd Prac.* 9 Ed. 297. 309.; and for the form of the rule to bring in the body,

in K. B. see *Append. to Tidd Sup.* 1833, p. 286. and of the rules given by the *flaxer* and secondary, in C. P. *id. ib.*; and by the *flaxer*, in the Exchequer. *Id.* 286, 7.

ⁱ R. H. 3 W. IV. 4 Barn. & Ad. 589. 1 Nev. & M. 400. 9 Bing. 663. 1 Crompt. & M. 261. 3 Tyr. Rep. 241. 1 Dowl. Rep. 731.

^k *Append. to Tidd Sup.* 1833, p. 287.

Attachment for disobedience of.

Affidavit for obtaining judge's order, &c.

Further proceedings.

Rules on sheriff, &c. to return process issued out of courts abolished by administration of justice act, and to bring in the body thereon.

Attachment against sheriff, or bail-bond, standing as a security.

on; but an attachment^a shall issue forthwith, for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the meantime. An *affidavit* of facts is necessary, on the latter rule, for obtaining a judge's order to bring in the body in vacation; and the proceedings thereon are similar to those which have been already stated, on a judge's order to return the writ in vacation. The court, however, will, upon payment of costs, set aside an attachment issued against the sheriff, upon the above rule, bail having been put in and perfected after the contempt, and before the issuing of the attachment^b. If special bail be put in and perfected, within the time allowed by the rules or orders, to return the writ and bring in the body, the plaintiff declares, and the cause proceeds in the ordinary way.

In the Exchequer of Pleas, a rule was made on the administration of justice act^c, that "in case any process should have issued out of any of the courts abolished by that act, the sheriff, to whom the same might have been issued, might be ruled to return such process into the court of Exchequer, in like manner as if the said process had been returnable in that court; and if such sheriff should have made a return to the said court, so abolished as aforesaid, or should make a return to the said court of Exchequer, of *cepi corpus*, he might be ruled in like manner, to bring in the body; and process so issued as aforesaid, might be returned to that court, by the sheriffs of the county of *Chester*, county of the city of *Chester*, and principality of *Wales*, in like manner as if the same had been returnable in that court."^d

Upon staying proceedings, either upon the bail bond, or upon an attachment against the sheriff for not bringing in the body, on perfecting bail above, if the plaintiff has lost a trial, the court or a judge will further require the bail to consent, that the bail-bond shall stand as a security. By *losing a trial* was formerly meant, that the plaintiff had been prevented, by the neglect of the defendant to put in or perfect bail in due time, from trying his cause in, and obtaining judgment of the same term in which the writ was returnable^e. This, of

^a For the form of an *affidavit*, in support of the rule for an attachment, for not bringing in the body, see *Append. to Tidd Sup.* 1833, p. 287; and for the rule for an attachment thereon, *id.* 288.

^b *Rex v. Sheriff of Middlesex*, in *Watts v. Hamilton*, 2 Nev. & M. 674. 2 Dowl. Rep. 432. S. C.

^c 11 Geo. IV. & 1 W. IV. c. 70. § 14.

^d R. M. 1 W. IV. reg. III. § 6. 1 *Crompt. & J.* 285. 1 *Tyr. Rep.* 165, 6., and see *Tidd Prac.* 9 Ed. 306.

^e 1 *Chit. R.* 270. (a.) 357. (a.) and see *Jaques v. Campbell*, 1 Dowl. & R. 450. *Rex v. Sheriff of Middlesex*, in *Waterhouse v. Eames*, 8 Dowl. & R. 140. *Rex v. Sheriff of London*, in *Lazarus v. Tanner*, 9 Moore, 422. 2 *Bing.* 227. S. C.

course, could only happen in *town* causes, or where the venue was laid in *London* or *Middlesex*: In *country* causes, it was not formerly usual, on staying proceedings against the sheriff, or on the bail-bond, when a trial had been lost, to require the sheriff, or bail, to consent that the bond should stand as a security, though there seems to have been the same reason for it as in town causes^a. But now, by a general rule of all the courts^b, "upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the attachment, or bail-bond, shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial; in a *town* cause, in the term next after that in which the writ is returnable, and in a *country* cause, at the ensuing assizes." Under this rule, the plaintiff must declare *conditionally*, if he can, in order to entitle him to have the bail bond^c, or an attachment against the sheriff^d, stand as a security. And where an arrest took place on the 5th *January*, and bail was put in on the 12th, and the body rule expired on the 20th, the court held, that an attachment obtained in *Hilary* term, might be set aside, without its standing as a security; as the plaintiff had not been prevented from entering his cause for trial, in the term next after the return of the writ^e.

^a Tidd *Prac.* 9 Ed. 303, 4. 317.

^b R. H. 2 W. IV. *reg.* V. 3 Barn. & Ad. 392. 8 Bing. 306, 7. 2 Crompt. & J. 200.

^c *Balmon* (or *Ballmont*) v. *Morris*, 1 Crompt. & M. 661. 3 Tyr. Rep. 521. S. C.

^d *Rex* v. Sheriff of *Middlesex*, 1 Dowl. Rep. 454, *per* *Patteson*, J. *Rex* v. She-

riff of *Middlesex*, 8 Leg. Obs. 491. *per* *Parke*, B. *Rex* v. Sheriff of *Essex*, in *Alexander* v. *Barrington*, 2 Dowl. Rep. 648. *per* *Parke*, B.; and see *Rex* v. Sheriff of *Middlesex*, in *Watts* v. *Hamilton*, 2 Nev. & M. 674. 2 Dowl. Rep. 432. S. C.

^e *Rex* v. Sheriff of *Middlesex*, in *Disney* v. *Anthony*, 4 Dowl. Rep. 765.

CHAP. XIV.

Of the PRIVILEGES of ATTORNIES ; and MODE of PROCEEDING in ACTIONS by and against them : and of the DELIVERY and TAXATION of their BILLS of COSTS.

Privileges of attornies, what. **THE** *privileges* of attornies, not affected by the uniformity of process act, are first, of suing, and being sued, in their own courts; secondly, of freedom from arrest; and thirdly, of laying the venue in *Middlesex*.

Before uniformity of process act. When an attorney of the King's Bench, or Common Pleas, was *plaintiff*, he was formerly entitled to sue in his own court, by *attachment* of privilege^a; and when he was *defendant*, he must have been sued in his own court, by *bill*^b, even as acceptor of a bill of exchange^c. In the Exchequer of Pleas, an attorney, side clerk, or other officer, might have sued by *venire facias*, or *capias* of privilege^d; and must have been sued by *bill*. The privileges of an attorney, however, to sue in his own court, by *attachment* of privilege in the King's Bench and Common Pleas, and by *capias* of privilege in the Exchequer, and to be sued by *bill* in all the courts, are taken away by the uniformity of process act^e; by which it is declared, that "the writs of *summons*, *capias*, and "*detainer*, shall be the only writs for the commencement of personal "actions, in any of the courts therein mentioned, in the cases to which "such writs are applicable:"^f An attorney, therefore, must now sue, like other persons, by writ of *summons*, *capias*, or *detainer*; and be sued by writ of *summons*. But though the mode of commencing actions by and

How affected by that act.

Of suing, and

^a *Seaman v. Ling*, 2 Salk. 668. *Pope v. Redfearne*, 4 Bur. 2027. *Pye v. Leigh*, 2 Blac. Rep. 1065. *Yardley v. Roe*, 3 Durnf. & E. 573.

^b 3 Blac. Com. 289. *Duffy v. Oakes*, 3 Taunt. 166.

^c *Comerford v. Price*, Doug. 312. *Atkins v. —*, 2 Chit. R. 63.; and see

Tidd Prac. 9 Ed. 80. 960.

^d *Walker v. Rushbury*, 9 Price, 16. *Tidd Prac.* 9 Ed. 81. Append. thereto, Chap. XIV. § 15, 16.

^e 2 W. IV. c. 39. § 21. *Ante*, 59.

^f *Wright v. Skinner*, 1 Meeson & W. 144. 1 Tyr. & G. 277. 4 Dowl. Rep. 745. S. C.

against attornies, is altered by the above act, yet they still, it seems, retain their privilege of suing, and being sued, in their own courts ^a. being sued, in their own courts.

An attorney, when *plaintiff*, was not formerly obliged to sue for a debt under *five* pounds, in the court of Requests for *London* ^b: And where a clerk in court in the Exchequer, with an attorney of the King's Bench, sued an attorney of the latter court, by *capias* of privilege, and recovered less than *five* pounds, the court of Exchequer held, that it was not a case within the *London* court of Requests' act ^c. But where an attorney of the King's Bench sued an attorney of the same court by *bill*, and recovered less than *five* pounds, it was holden, that he was not entitled to costs, under the above act ^d. The jurisdiction given to the commissioners, by the late court of Requests' act for *London* ^e, is a *concurrent* only, and not an *exclusive* jurisdiction: and as there is no prohibitory clause therein, as in the court of Requests' acts for *Westminster* ^f, the *Tower Hamlets* ^g, and other places ^h, an attorney, or other person, is not bound to proceed in the court of Requests for *London*; but may bring his action in a superior court, for the recovery of any sum, however trifling, subject to the certificate of a judge, to deprive him of costs, under the statute 43 Eliz. c. 6. where the debt or damages recovered do not amount to *forty* shillings ⁱ. But, in the late court of Requests' act for *Westminster*, there is a clause ^k, that "no action or suit, for any debt not exceeding the sum of *forty* shillings, and recoverable by virtue of that act, in the said court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any other court whatsoever." An attorney, therefore, would not now be allowed to sue in a superior court, for a debt not exceeding the sum of 40*s.* recoverable by virtue of the latter act. When an attorney is *defendant*, he is not subject to the

^a Chapm. K. B. 2 *Addend.* 75.; and see Davidson v. Chilman, (or Watkins,) 1 Scott, 117. 1 Bing. N. R. 297. 3 Dowl. Rep. 129. S. C. Lewis v. Kerr, 13 Leg. Obs. 62.

^b Board v. Parker, 7 East. 47. 3 Smith R. 52. S. C.; and see Johnson v. Bray, 5 Moore, 622. 2 Brod. & B. 698. S. C. Dyer v. Levy, 4 Dowl. Rep. 630. 1 Har. & W. 640. 11 Leg. Obs. 323. S. C. Wright v. Skinner, 1 Meeson & W. 144. 1 Tyr. & G. 277. 4 Dowl. Rep. 745. S. C.

^c Elkins v. Harding, 1 Crompt. & J. 345. 1 Tyr. Rep. 274. S. C.

^d Burn v. Pasmore, 1 Crompt. & J. 346. (a). 1 Dowl. Rep. 17. 1 Leg. Obs. 156. S. C.

^e Stat. 5 & 6 W. IV. c. xelv.

^f 6 & 7 W. IV. c. cxxxvii. § 86.; and see 23 Geo. II. c. 27. § 21. Barney v. Tubb, 2 H. Blac. 353.

^g 23 Geo. II. c. 20. § 21.

^h 25 Geo. II. c. 38. Anstee v. Lilley, 1 Man. & R. 564. 18 Geo. III. c. 36. § 24. Parker v. Elding, 1 East, 352.

ⁱ Wright v. Nuttall, 10 Barn. & C. 492. 5 Man. & R. 454. S. C.; and see Tidd Prac. 9 Ed. 952, 3.

^k 6 & 7 W. IV. c. cxxxvii. § 86.

jurisdiction of the county court of *Middlesex*^a: but in *London*^b, *Westminster*^c, the *Tower Hamlets*^d, *Southwark*^e, and the *Eastern* half of the hundred of *Brixton*^e, he is expressly subjected thereto. Where the plaintiff, however, in an action against an attorney, recovers less than *forty* shillings damages, in an action for a debt recoverable in the county court, the judge may certify, under the statute 43 Eliz. c. 6. so as to deprive the plaintiff of costs, although the defendant could only be sued in a superior court^f.

Freedom from
arrest.

When attorneys
are of different
courts.

Attornies also, notwithstanding the uniformity of process act, still retain their privilege of freedom from arrest^g; it being declared by that act^h, that "nothing therein contained, shall subject any person "to arrest, who, by reason of any privilege, usage or otherwise, may "now by law be exempt therefrom." An attorney of the King's Bench was formerly allowed to sue an attorney of the Common Pleas, by *attachment* of privilege; but he could not have been arrested, and holden to special bail: If he were, the court would have set aside the proceedings for irregularity, with costsⁱ. So, where an attorney of the Common Pleas had arrested an attorney of the King's Bench, the latter was discharged by the court of Common Pleas, on filing common bail^k. But, in the Exchequer of Pleas, it was holden that an attorney of the King's Bench, or Common Pleas, might have been arrested and held to bail, at the suit of a sworn or side clerk of the Exchequer, upon a *capias* of privilege, issuing out of that court^l: and the privileges of the sworn clerks, not being abolished by the administration of justice act^m, which opened the court of Exchequer

^a 23 Geo. II. c. 33. *Gardner v. Jessop*, 2 Wils. 43. *Wiltshire v. Lloyd*, Doug. 380; but see *Silk v. Rennett*, 3 Burr. 1583. *Parker v. Vaughan*, 2 Bos. & P. 29.

^b 5 & 6 W. IV. c. xciv. § 32.; and see stat. 39 & 40 Geo. III. c. civ. § 10.

^c 6 & 7 W. IV. c. cxxxvii. § 49; and see 24 Geo. II. c. 42. § 1.

^d 23 Geo. II. c. 30. § 21.

^e 4 Geo. IV. c. cxxiii. § 7.

^f *Wright v. Nuttall*, 10 Barn. & C. 492. 5 Man. & R. 454. S. C.

^g *Redman's case*, 1 Mod. 10. *Beck v. Lewin*, T. 56 Geo. III. K. B. *Pearson v. Henson*, 4 Dowl. & R. 73. Anon. 1 Dowl. Rep. 3. 1 Leg. Obs. 44. S. C. K. B. *Adams v. Bugby*, 12 Moore, 253. C. P. *Tidd Prac.* 9 Ed. 80. And for

the former mode of proceeding, by attachment or *capias* of privilege, in actions at the suit of attorneys, see *Tidd Prac.* 9 Ed. 319, 20, 21. and by *bill*, in actions against them, *id.* 321, &c.

^h 2 W. IV. c. 39. § 19.

ⁱ *Pearson v. Henson*, 4 Dowl. & R. 73.

^k *Carlton v. Donford*, 2 Moore & S. 588.; and see *Pitt v. Pocock*, 2 Crompt. & M. 146. 4 Tyr. Rep. 85. *Keep v. Biggs*, 2 Dowl. Rep. 278. S. C.; but see *Adams v. Bugby*, 12 Moore, 255. *semb. contra.* See also Anon. 1 Dowl. Rep. 3. 1 Leg. Obs. 44. S. C.

^l *Walker v. Rushbury*, 9 Price, 16. *Bowyer v. Hoakins*, 1 Younge & J. 199, and see Man. Excheq. 142.

^m 11 Geo. IV. & 1 W. IV. c. 70. § 10.

to all attornies, and gave them leave to practise there, without employing clerks in court, it was holden that they might, notwithstanding that act, have arrested other attornies, who became indebted to them, in the same way as they did before^a. But the writ of *capias* of privilege, being abolished by the uniformity of process act, it may admit of doubt, whether they would now be permitted to arrest attornies of the other courts: And it has been holden, that *trespass* is not maintainable for holding an attorney to bail, notwithstanding his privilege^b. There seems to be nothing in the act to take away the privilege of an attorney to lay the venue in *Middlesex*, when he is plaintiff^c: but if he sue, though privileged, by another attorney, and not in person, he thereby loses his privilege of retaining the venue in that county^d.

Laying venue
in *Middlesex*.

It was formerly holden, that where an attorney had once appeared, or undertaken to be attorney for another, he should not be permitted to withdraw himself^e; and it was said to be his duty to proceed in the suit, although his client neglected to bring him money: and therefore where, on that account, he neglected to proceed according to the practice of the court, whereby judgment of *non pros* was signed against the plaintiff, the court made a rule upon the attorney, to pay the costs of such judgment, together with the costs of the application^f. It is even said to have been determined, in the Common Pleas, that an attorney having quitted his client before trial, could not bring an action for his bill^g. So, in Chancery, it has been holden, that a solicitor proceeding to a certain length in a cause, shall not leave it there, but shall go on^h; and that a solicitor having declined to act for his client, has no lien for his costs, upon a fund in courtⁱ. But, on the other hand, it has been ruled at *nisi prius*, that an attorney who has

Whether an attorney is bound to proceed, without being supplied with money by his client.

^a *Stokes v. White*, 2 Dowl. Rep. 703. 1 Crompt. M. & R. 223. 4 Tyr. Rep. 786. S. C.

^b *Noel v. Isaac*, 1 Crompt. M. & R. 753. 5 Tyr. Rep. 376. S. C.

^c *Partington v. Woodcock*, 2 Dowl. Rep. 550. 8 Leg. Obs. 493. S. C. per *Patteson*, J., and see *Chapm. K. B. 2 Addend. 76. Dax. Excheq. 2 Ed. 15, 16.*

^d *Harrington v. Page*, 2 Dowl. Rep. 164. 6 Leg. Obs. 378. S. C. per *Taunton*, J. *Lowless v. Timms*, 3 Dowl. Rep. 707. 10 Leg. Obs. 238, 9. S. C.; & see

Welland v. Frument, Barnes, 479. Cas. Pr. C. P. 132. Pr. Reg. 419. S. C. *Girdler v. Wathews*, Barnes, 484. Cas. Pr. C. P. 145. Pr. Reg. 420. S. C. *Mounsey v. Watson*, 7 Barn. & C. 683.

^e *Anon.* 1 Sid. 81.

^f *Mordecai v. Solomon*, Say. Rep. 173.

^g *Cresswell v. Byron*, 14 Ves. 272, 3.

^h *Langstaffe v. Taylor*, 14 Ves. 273.

ⁱ *Cresswell v. Byron*, *Id.* 271., and see *Commerell v. Poynton*, 1 Swanst. 1. *Mayne v. Hawkey*, 3 Swanst. 93; and see *Tidd Prac.* 9 Ed. 86, 7.

given notice that he will not go on with a cause in the court of Chancery, without being supplied with money, has a right to desist from it; and may recover for the business done up to that time ^a. In a subsequent case ^b it was holden, in the Common Pleas, that an attorney is not compellable to proceed to the end of a suit, in order to be entitled to his costs; but may, upon reasonable cause and notice, abandon the conduct of the suit, and in such case may recover his costs, for the period during which he was employed. And it has since been decided, in the Exchequer, that an attorney who has undertaken a cause, is not bound to proceed, without adequate advances from time to time by his client, for his expenses out of pocket: and therefore, the court will not compel an attorney, even after notice of trial, to carry the cause into court, unless the client supply him with sufficient funds to pay such expenses ^c.

Attorney's right to recover, when part of his bill is taxable, and part not.

It has been made a question, in the construction of the statute 2 Geo. II. c. 23, § 23 ^d. (made perpetual by statute 30 Geo. II. c. 19. § 75,) for the delivery and taxation of attorney's bills, whether an attorney may recover for charges or disbursements not taxable, when part of his demand is for business done in court: and the distinction formerly taken on this subject was, that he might, when he had delivered no bill at all ^e; but that where he had delivered a bill irregularly, he could not ^e: And accordingly, where an attorney had not delivered any bill to his client before action brought, but afterwards delivered a bill of particulars, under a judge's order, he was holden to be entitled to recover charges, for money paid for his client's use, having no reference to his business of an attorney, although other items in the bill of particulars were taxable ^f. The above distinction, however, does not seem to be now attended to in practice; but the rule is, that where the demand is altogether for business of a professional nature, if any part of an attorney's bill be for business done in

^a Rowson v. Earle, 1 Moody & M. 538. per *Ld. Tenterden*, Ch. J.; and see *Hoby v. Built*, 3 Barn. & Ad. 350. 1 Leg. Obs. 363. S. C. cited. *Lawrence v. Potts*, 6 Car. & P. 428. per *Tindal*, Ch. J.

^b Vansandau v. Browne, 9 Bing. 402. 2 Moore & S. 543. 1 Dowl. Rep. 715. S. C.

^c Wadsworth v. Marshall, 2 Crompt. & J. 665; and see *Turner* Chan. Prac. 551. *Man. Ex. Pr.* 585, 6. *Merrifield's Law of Attornies*, 181.

^d For this statute, and its construction and the cases decided thereon, see *Tidd Prac.* 9 Ed. 325, &c.

^e *Lloyd v. Mead*, E. 27 Geo. III. 2 Bos. & P. 344. per *Buller*, J. *Miller v. Towers*, Peake Cas. N. Pri. 3 Ed. 188. per *Ld. Kenyon*, Ch. J. *Hill v. Humphreys*, 2 Bos. & P. 343. 345. per *Ld. Eldon*, Ch. J. 1 Campb. 439. n. *Rosc. Evid.* 2 Ed. 197.

^f *Mowbray v. Fleming*, 11 East, 285.

court, the bill must be delivered a month before the action is brought, otherwise the plaintiff cannot recover^a. In support of an application, however, to tax an attorney's bill, it must be sworn that there are taxable *items* in the bill, although the bill itself is exhibited^b. Where the plaintiff had been employed in defending a cause, and had done other business not taxable, and had delivered separate bills, Lord *Tenterden* ruled, that all ought to have been included in one bill; and that the second bill ought to have been delivered a month before the action^c. And where an attorney had claims on his client for conveyancing, and also for charges at law, and received payments on account, without specific appropriation to either head of debt, the court held, that the whole formed one entire demand, not to be separated; and that the plaintiff could not apply the payments to the common law *items* of his demand only, so as to deprive the defendant of the benefit of taxation, *quoad* the residue of the bill^d. But it seems, that where a bill is delivered according to the statute, containing various taxable *items*, one *item* of which is not sufficiently described, pursuant to the provisions of the statute, the plaintiff may still recover the amount of the bill^e.

When the demand is not altogether for business of a professional nature, but partly for business done in a different character^f, or the attorney has lent money to his client on a distinct occasion^g, or there are other matters between them which have no reference to his profession, as for rent^h, or if the plaintiff were a banker as well as an attorney, and had advanced money to the defendant in his former

^a *Winter v. Payne*, 6 Durnf. & E. 645; and see *Weld v. Crawford*, 2 Stark. Ni. Pri. 538. *per Abbott*, Ch. J. *Watt v. Collins*, Ry. & Mo. 284. 2 Car. & P. 71. S. C. *per Best*, Ch. J. *Smith v. Taylor*, 5 Moore & P. 66. 7 Bing. 259. 1 Dowl. Rep. 212. 1 Leg. Obs. 206. S. C. *Wardle v. Nicholson*, 4 Barn. & Ad. 469. 1 Nev. & M. 355. S. C. *Doe d. Palmer v. Roe*, 4 Dowl. Rep. 95. 1 Har. & W. 339. 11 Leg. Obs. 13, 14. S. C. *Rosc. Evid.* 2 Ed. 197, 8. *Merrifield's Law of Costs*, 182.

^b *Ex parte King*, 8 Dowl. Rep. 41.

^c *Thwaites v. Mackerson*, 1 Moody & M. 199. 3 Car. & P. 341. S. C. *per* *Ld. Tenterden*, Ch. J.; and see *Doe d. Palmer v. Roe*, 4 Dowl. Rep. 95.; but see *Becke v. Penn*, 7 Car. & P. 397. *per*

Tindal, Ch. J.

^d *James v. Child*, 2 Tyr. Rep. 732. 2 Crompt. & J. 678. S. C.; and see *Chitty v. Naish*, 9 Leg. Obs. 13. *per Taunton*, J.

^e *Drew v. Clifford*, Ry. & Mo. 280. 2 Car. & P. 69. S. C. *per Abbott*, Ch. J.

^f *Wardle v. Nicholson*, 4 Barn. & Ad. 475. 1 Nev. & M. 364. S. C. *per Little-dale*, J.

^g *Heming (or Hemming) v. Wilton*, 1 Moody & M. 529. 4 Car. & P. 318. 1 Leg. Obs. 109. 159. S. C. *per* *Ld. Tenterden*, Ch. J.; and see *Same v. Same*, 5 Car. & P. 54, *per Parke*, J. *Hill v. Humphreys*, 2 Bos. & Pul. 344, 5. *Mowbray v. Fleming*, 11 East. 285.

^h *Watt v. Collins*, 2 Car. & P. 73. Ry. & Mo. 284. S. C. *per Best*, Ch. J.

character only ^a, the plaintiff might recover that part of his demand, though no bill had been delivered; or even, as it seems, though it had been included in a signed bill, irregularly delivered ^b. But it has been determined, that an attorney cannot maintain an action, even for the money out of pocket in a cause, until he has delivered a bill signed ^c: And money paid by an attorney for costs, which his client has been adjudged to pay, has been considered as a *disbursement* within the statute ^d. When an attorney succeeds in a suit to which he is a party, it is customary to allow him, on taxation, the same costs as if he were employed for another person ^e.

Taxation of costs, on private bills in parliament.

On trial of controverted elections.

The taxation of costs, on private bills in parliament, is regulated by the statutes 6 Geo. IV. c. 123. §§ 1, 2. and 7 & 8 Geo. IV. c. 64. §§ 1, 2. And, by the statutes 28 Geo. III. c. 52. § 22. (the *Grenville* act,) and 53 Geo. III. c. 71. §§ 7, 13. (the *Wynne* act,) provision was made for the taxation and recovery of all costs, expenses and fees, due to the parties, witnesses, and officers of the House of Commons, by reason of the trial of controverted elections. But these latter statutes are repealed by the 9 Geo. IV. c. 22. which provides for the taxation and recovery of the costs and expenses of prosecuting or opposing any petition, presented under the provisions of that act, and the costs, expenses and fees, which shall be due and payable to any witness, summoned to attend before the committee appointed to consider the merits of any such petition, or to any clerk or officer of the House of Commons, upon the trial of any such petition. Under this statute, costs incurred by opposing a petition against the return of a member to parliament, may be recovered against one of two persons who have signed it ^f. But the court will not allow judgment to be entered up, under the above statute, on a certificate of the Speaker of the House of Commons, for the costs of opposing an election petition, when it appears, upon *affidavit*, that the certificate was founded upon the report of a select committee for trying the merits of the petition, which was not duly appointed according to the provisions of that act ^g. The certificate of the Speaker is conclusive, as to the amount of costs ordered to be paid by parties

^a *Wardle v. Nicholson*, 4 Barn. & Ad. 475. 1 Nev. & M. 364. S. C. per *Little-dale*, J.

^b *Rosc. Evid.* 2 Ed. 198.

^c *Miller v. Towers*, *Peake Cas. Nl. Pri.* 3 Ed. 138. per *Ld. Kenyon*, Ch. J.

^d *Crowder v. Shee*, 1 Campb. 437. per *Ld. Ellenborough*, Ch. J.; and see *Benton*

v. Garcia, 3 Esp. Rep. 149. per *Heath*, J.

^e *Jarvis (or Jervis) v. Dewes*, 1 Tyr. & G. 240. 4 Dowl. Rep. 764. S. C.

^f *Gurney v. Gordon*, 2 Tyr. Rep. 616. 2 Crompt. & J. 614. 9 Bing. 37. 2 Moore & S. 187. S. C.

^g *Bruyeres v. Halcomb*, 5 Nev. & M. 149. 3 Ad. & E. 381. 1 Har. & W.

whose opposition to a petition has been declared frivolous and vexatious^a. And the court will not enter on the roll, a suggestion of the proceedings disclosed on a motion to enter up judgment on such certificate, under the statute 9 Geo. IV. c. 22. § 63^b.

In the Common Pleas, *three* summonses were formerly necessary, in case of non-attendance, before an order could be obtained for the delivery or taxation of an attorney's bill^c: But, by a general rule of all the courts^d, "an order to deliver or tax an attorney's bill, may be made at the return of *one* summons, the same having been served *two* days before it is returnable." There was formerly a rule in the King's Bench^e, that "on every appointment to be made by the master, the party on whom the same was served, should attend such appointment, without waiting for a *second*; or in default thereof, the master should proceed *ex parte*, on the first appointment:" In the Common Pleas, there must have been *three* appointments, in case of non-attendance, before the prothonotary could proceed *ex parte*^f: But, by a general rule of all the courts^g, "*one* appointment only shall be deemed necessary, for proceeding in the taxation of an attorney's bill."

Summons and order to deliver, or tax, attorney's bill.

One appointment only necessary for taxing it.

In the King's Bench, when the defendant applies to set off the debt and costs in one action against those in another, the court in general will not suffer it to be done, until the attorney's bill, for business done in the cause wherein he was concerned, be first discharged^h: But it was otherwise in the Common Pleas, where the attorney's lien for costs was held to be subject to the equitable claims that existed between the parties in the causeⁱ: And, in the

Attorney's lien, on setting off debt, damages, or costs.

410. S. C.; and as to the mode in which the Speaker's certificate for costs, under the above statute, should refer to the report of the examiners appointed to tax those costs, see *id. ib.*

^a *Ranson v. Dundas*, 3 Bing. N. R. 123.

^b *Same v. Same*, *id.* 180.

^c *Imp. C. P. 7 Ed. 556, 7*; and see *Tidd Prac. 9 Ed. 335*.

^d *R. H. 2 W. IV. reg. I. § 91. 3 Barn. & Ad. 388. 8 Bing. 302, 3. 2 Crompt. & J. 194.*

^e *R. H. 32 Geo. III. K. B. 4 Durnf. & E. 580.*

^f *Imp. C. P. 7 Ed. 557*; and see *Tidd Prac. 9 Ed. 336. 680.*

^g *R. H. 2 W. IV. reg. I. § 92. 3 Barn. &*

Ad. 368. 8 Bing. 303. 2 Crompt. & J. 195.

^h *Mitchell v. Oldfield*, 4 Durnf. & E. 123, 4. *Randle v. Fuller*, 6 Durnf. & E. 466. *Glaister v. Hewer*, 8 Durnf. & E. 70. *Middleton v. Hill*, 1 Maule & S. 240. *Symonds v. Mills*, 8 Taunt. 526.

ⁱ *Thrustout d. Barnes v. Crafter*, 2 Blac. Rep. 826. *Say. Costs, 254. S. C. Schoole v. Noble*, 1 H. Blac. 23. *Nunez v. Modigliani*, *id.* 217. *Vaughan v. Davies*, 2 H. Blac. 440. *Dennie v. Elliott*, *id.* 587. *Hall v. Ody*, 2 Bos. & P. 28. *Emdin v. Darley*, 1 New Rep. C. P. 22. *Brown v. Sayce*, 4 Taunt. 320. *Symonds v. Mills*, 8 Taunt. 526. *Lomas v. Mellor*, 5 Moore, 95. *Webber v. Nicholas*, 4 Bing. 16. 12 Moore, 87. *S. C. Bridges v. Smyth*, 8 Bing. 29.

King's Bench, it was holden, that the attorney had a lien on the judgment obtained by his client against the opposite party, to the extent of his costs of that cause only^a; and the plaintiff, in that court, might have set off interlocutory costs in the *same* cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause, notwithstanding the objection of the defendant's attorney, on the ground of his lien, which only attached on the general result of the costs, &c. of the cause^b. But now, by a general rule of all the courts^c, "no set off of damages or costs between parties shall be allowed, to the prejudice of the attorney's lien for costs, in the particular suit against which the set off is sought; provided nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." This rule gives the attorney a lien on a judgment obtained by him for his costs, as between *attorney* and *client*^d. And no set off of judgments will be allowed, even though they arise out of the same award, without satisfying the attorney's lien^e. So where, upon a reference of two causes, damages in the first were ordered by the award to be set off against costs in the second, the court held that this could only be done, subject to the lien of the plaintiff's attorney in the first cause, for his costs^f. But the above rule only applies to cases of setting off costs between adverse parties; and therefore, where there are several defendants, and some succeed and some do not, the unsuccessful defendants may set off the costs due to the successful one, notwithstanding the effect of it would be, to deprive the attorney of his lien^g.

^a *Stephens v. Weston*, 3 Barn. & C. 585. 5 Dowl. & R. 399. S. C. 4 Bing. 17. S. C. cited. *Watson v. Maskell*, 1 Scott, 286. 1 Bing. N. R. 366. S. C.

^b *Howell v. Harding*, 8 East, 362. *Lang v. Webber*, 1 Price, 375.; and see *Doe d. Dangerfield v. Allsop*, 9 Barn. & C. 760. *Tidd Prac.* 9 Ed. 339. 992.

^c R. H. 2 W. IV. reg. I. § 93. 3 Barn. & Ad. 388. 2 Crompt. & J. 195. and see *Doe d. Hope v. Carter*, 1 Moore & S. 516. 8 Bing. 330. 1 Dowl. Rep. 269. S. C.

^d *Watson v. Mascall*, (or *Maskell*), 3 Dowl. Rep. 638. 1 Scott, 658. 1 Bing. N. R. 727. 1 Hodges, 73. S. C.

^e *Domett v. Helyer*, 2 Dowl. Rep. 340. 8 Leg. Obs. 347. S. C.

^f *Cowell v. Betteley*, 10 Bing. 432. 4 Moore & S. 265. 2 Dowl. Rep. 790. S. C. and see *Cadle (or Caddell) v. Smart*, 1 Tyr. & G. 475. 4 Dowl. Rep. 760. 12 Leg. Obs. 198. 9. S. C. *Doe d. Swinton v. Sinclair*, 3 Scott, 42. 5 Dowl. Rep. 26. 12 Leg. Obs. 322. 3. S. C.

^g *George v. Elston*, 1 Bing. N. R. 513. 1 Scott, 513. 1 Hodges, 63. 3 Dowl. Rep. 419. 9 Leg. Obs. 414. S. C. and see *Lees v. Kendall*, (or *Reffitt*), 5 Nev. & M. 340. 3 Ad. & E. 707. 1 Har. & W. 316. S. C.

CHAP. XV.

Of the PROCEEDINGS in ACTIONS against PRISONERS, in CUSTODY of the SHERIFF, &c.; and of the MARSHAL of the KING'S BENCH, or WARDEN of the FLEET PRISON: and of the RELIEF of DEBTORS, in EXECUTION for SMALL DEBTS, &c.

PRISONERS in general may be considered as they are in custody on a *civil* or *criminal* account; and on a *civil* account, they are either taken or detained in custody of the *sheriff*, &c. on *mesne* process before, or *final* process after judgment; or they are committed to the custody of the *marshal* of the King's Bench, or *warden* of the *Fleet* prison, on a *cepi corpus*^a, or *habeas corpus*, or surrender in discharge of bail.

Prisoners considered as in custody, on civil or criminal account, &c.

The proceedings against prisoners are either by the *same* plaintiff, at whose suit they were originally taken or detained in custody, for the cause of action expressed in the process, which are in continuance of the action already brought, or for a *different* cause, which requires the bringing of a new action; or they are by a *third* person. In the present Chapter, it is intended to consider the alterations which have been made in such proceedings, by recent statutes, rules of court, and judicial decisions; with the relief of prisoners in execution for small debts, by the statute 48 Geo. III. c. 123. &c. It has been already seen^b, that when the defendant is arrested on the *capias*, he is either discharged out of custody, upon giving bail to the sheriff, or an attorney's undertaking to cause special bail to be put in for him according to the exigency of the writ, or on depositing in the sheriff's hands, the sum indorsed thereon, together with *ten* pounds in addition, to answer costs, &c. on the statute 43 Geo. III. c. 46. § 2; or he remains in custody, or escapes, or is rescued, &c.

Proceedings against, by same plaintiff, or third person.

Mode of proceeding against prisoners, in custody of sheriff, &c.

By the uniformity of process act^c, "if a defendant be taken or charged in custody of the sheriff, upon the writ of *capias* and im-

Time for declaring against.

^a *Stannard v. Fleet, Barnes, 392.* and see *Tidd Prac. 9 Ed. 341.*

^b *Ante, 130.*

^c 2 W. IV. c. 39. § 4.

"prisoned for want of sureties for his appearance thereto, the plaintiff in such process may, before the end of the next term after the detainer or arrest of such defendant, declare against such defendant, and proceed thereon, in the manner, and according to the directions of the statute 4 & 5 W. & M. c. 21."^a And accordingly, in the notice or *warning*, to be written under or indorsed on the writ, it is stated that if a defendant, being in custody, shall be detained on that writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant, before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution^b. And, by a general rule of all the courts^c, it is declared and ordered, that "in all cases in which a defendant shall have been, or shall be detained in prison, on any writ of *capias* or *detainer*, under the statute 2 W. IV. c. 39., or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been, or shall be rendered to prison, before declaration, on any such process, the plaintiff in such process shall declare against such defendant, before the end of the next term after such arrest or detainer, or render and notice thereof; otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute 2 W. IV. c. 39. *Sched. No. 2.*, unless further time to declare shall have been given to such plaintiff, by rule of court, or order of a judge."

Beginning of
declaration.
Three copies
formerly necessary.

The declaration against a prisoner in custody of the sheriff, &c. begins by stating him to be in such custody^d: And it was formerly necessary, in the King's Bench, when the defendant was in custody of the sheriff, &c. to make *three* copies of the declaration; one to be delivered to the defendant, or left for him with the gaoler or turnkey; another, to be annexed to the original *affidavit* of such delivery, and filed with the clerk of the rules; and a third, to be annexed to an office copy of such affidavit: on which latter copy a rule was given, with the clerk of the rules, for the defendant to appear and plead; and in default thereof, judgment might have been

^a 2 W. IV. c. 39. § 4. And for the mode of proceeding in actions against prisoners in custody of the sheriff, &c. previous to the plea, see *Tidd Prac.* 9 Ed. 341, &c.; and subsequent to the plea, *id.* 360, &c.

^b *Sched.* to stat. 2 W. IV. c. 39. No.

⁴. *Append.* to *Tidd Sup.* 1833, p. 274.

^c R. T. 3 W. IV. *reg.* 1. 5 *Barn. & Ad.* 467. 2 *Nev. & M.* 287. 10 *Bing.* 153. 3 *Moore & S.* 559, 60. 1 *Crompt. & M.* 865. 3 *Tyr. Rep.* 985. 2 *Dowl. Rep.* 211, 12.

^d *Append.* to *Tidd Sup.* 1833, p. 289.

signed^a. In the Common Pleas, the production of a copy of the *affidavit* to the prothonotary being dispensed with^b, it was only necessary to have *two* copies of the declaration, one to be delivered to the defendant, or left for him with the gaoler or turnkey, and the other to be annexed to an *affidavit* of such delivery; upon which latter copy, the secondary would have given a rule for the defendant to appear and plead. And now, by a general rule of all the courts^c, "when the plaintiff declares against a prisoner, it shall not be necessary to make more than *two* copies of the declaration, of which one shall be served, and another filed, with an *affidavit* of service^d; upon the office copy of which *affidavit* a rule to plead may be given."

Two copies only now required.

The mode of *charging* a defendant in actual custody of the sheriff, &c. by the *same* plaintiff for a *different* cause of action, or by a *third* person, when the cause of action is of a hailable nature, is by making an *affidavit* thereof, and suing out a writ of *capias*, in the form directed by the statute 2 W. IV. c. 39.^e and leaving it at the sheriff's office; but if the cause of action be not hailable, the *same* plaintiff, or a *third* person, may proceed against the defendant, as if he were at large, by serving him with a copy of a writ of *summons*^f.

Mode of proceeding against prisoners, in custody of sheriff, &c. by same plaintiff for a different cause of action, or by a third person.

The principal alteration which has been made respecting prisoners, is as to the mode of *detaining* them in custody of the marshal of the King's Bench, or warden of the *Fleet* prison. In the King's Bench, when the defendant was committed to the custody of the marshal, on a bill of *Middlesex* or *latitat*, &c. or on an *attachment* of privilege, the plaintiff, in order to detain him, must formerly have filed a *bill* against him, as a prisoner of the court, with the clerk of the declarations in the King's Bench office, and delivered a copy of it to the defendant, or turnkey, at the King's Bench prison^g. In the Common Pleas and Exchequer, when the defendant was a prisoner in custody of the warden of the *Fleet*, it was formerly necessary to bring him up, by *habeas corpus*, to the bar of the court, in order to charge him with a declaration, at the suit of the plaintiff^h:

Prisoners in custody of marshal, or warden.

Ancient mode of detaining, in custody of marshal, in K. B.

In custody of warden, in C. P. and Exchequer.

^a R. E. 5 W. & M. reg. 3. § 2. (b.) K. B. and see Tidd *Prac.* 9 Ed. 344, 5.

^b Imp. C. P. 7 Ed. 666. 672.

^c R. H. 2 W. IV. reg. 1. § 36. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Cromp. & J. 178.

^d Append. to Tidd *Sup.* 1833, p. 289, 90.

^e § 4.

^f *Ante*, 65, 6.; and see Robertson v.

Douglas, 1 Durnf. & E. 192. Culme v. Dingle, Barnes, 392, 3. Tidd *Prac.* 9 Ed. 345; but see Pryme v. Moore, Barnes, 392.

^g Tidd *Prac.* 9 Ed. 353, 4.

^h *Id.* 355. And for the mode of proceeding in actions against prisoners in custody of the marshal or warden, before the uniformity of process act, see Tidd *Prac.* 9 Ed. 353, &c. 360, &c.

But this latter mode of proceeding was dispensed with, by the 8 & 9 W. III. c. 27. § 13. "for the more easy and quick obtaining of judgment, against prisoners in the *Fleet*." And now, by the 2 W. IV. c. 39. § 8. "when it shall be intended to detain, in any personal action, any person, being in the custody of the marshal of the marshalsea of the court of King's Bench, or of the warden of the *Fleet* prison, the process of *detainer* shall be according to the form of the writ of *detainer*, contained in the schedule to that act, and marked "No. 5."^a

This writ is issued, on a proper *præcipe*^b, and directed to the marshal of the King's Bench, or warden of the *Fleet* prison^c; commanding him, that he *detain* the defendant, if he shall be found in his custody, at the delivery thereof to him; and him safely keep, in an action on promises, (or, of debt, &c. *as the case may be*,) at the suit of the plaintiff, until he shall be lawfully discharged from his custody^c: and that, on receipt thereof, the said marshal, or warden, do warn the defendant, by serving a copy thereof on him, that within *eight* days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him, in the court in which he is sued, to the said action; and that, in default of his so doing, the plaintiff may declare against him, before the end of the term next after his *detainer*, and proceed thereon to judgment and execution^c: and further commanding the marshal or warden, that immediately after the service thereof, he do return the writ, or a copy thereof, to the said court, together with the day of the service thereof."^c The form of the writ of *detainer* must be strictly pursued: and therefore, where it was directed to "the marshal of our prison of the marshalsea," instead of "the marshal of the marshalsea of our court before us," the court set it aside^d.

Indorsements thereon.

Copy of writ, and indorsements, to be delivered to mar-

The writ of *detainer* is required to be indorsed, in the same manner as the writ of *capias*^e; but not to contain the warning on that writ^f: And "a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the said marshal or warden, to whom the same shall be directed, and who

^a Append. to Tidd *Sup.* 1833, p. 288.

9.

^b *Id.* 288.

^c Sched. to stat. 2 W. IV. c. 39. No.

5. Append. to Tidd *Sup.* 1833, p. 288.

9. And for decisions on the writ of *detainer*, &c. see 9 Leg. Obs. 226, 7.

^d *Storr v. Mount*, 2 Dowl. Rep. 417.

7 Leg. Obs. 301. S. C. *per Littledale, J.*

^e Sched. to stat. 2 W. IV. c. 39. No.

4. Append. to Tidd *Sup.* 1833, pp. 274.

277; and see *Jones v. Price*, 2 Dowl. Rep.

410. 8 Leg. Obs. 59. S. C. *Gadderer*

v. Sheppard, 4 Dowl. Rep. 577. 11 Leg.

Obs. 408. S. C.

^f Sched. to stat. 2 W. IV. c. 39. No.

5. Append. to Tidd *Sup.* 1833, p. 288.

"shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; which process may issue from either of the superior courts of law at *Westminster*; and the declaration thereupon shall and may allege the prisoner to be in the custody of the said marshal or warden, as the fact may be^a; and the proceedings shall be as against prisoners in the custody of the sheriff^b, unless otherwise ordered by some rule to be made by the judges of the said courts."^c By this clause, it appears that the writ of *detainer* may issue from either of the superior courts of law at *Westminster*: and as the declaration thereupon may allege the prisoner to be in custody of the marshal or warden, as the fact may be, and the proceedings shall be as against prisoners in custody of the sheriff, &c. it has been determined, that the court of Common Pleas may issue a writ of *detainer*, directed to the marshal of the King's Bench^d; or the court of King's Bench may issue such writ, directed to the warden of the *Fleet* prison^e: and it is not necessary, in either case, to bring up the prisoner by *habeas corpus*^f, into the court from which the writ issued, in order to charge him with a declaration. But a plaintiff having lodged a writ of *detainer* with the marshal, cannot, after having discovered it to be irregular, consider it as a nullity, and issue a fresh writ^g.

shal, or warden; who is to serve it on defendant.

Declaration, and proceedings thereon.

Writ may issue from C. P. to marshal, or from K. B. to warden.

The mode of *charging* the defendant in the actual custody of the marshal or warden, by the *same* plaintiff for a *different* cause of action, or by a *third* person, when the cause of action is of a bailable nature, is by making an *affidavit* thereof, and suing out a writ of *detainer*, and proceeding thereon, as before directed^h. But, if the cause of action be not bailable, the *same* plaintiff, or a *third* person, may sue out a writ of *summons*, and serve the defendant with a copy of it, as in ordinary casesⁱ.

Mode of proceeding against prisoner, in custody of marshal or warden, by same plaintiff, for a different cause of action, or by a third person.

The declaration against a prisoner, in custody of the *marshal* or *warden*, begins by stating him to be in such custody^k: And, by a late

Beginning of declaration, against prisoner,

^a Append. to Tidd *Sup.* 1833. p. 291.

^b For these proceedings, see Tidd *Prac.* 9 Ed. 341, &c. 360, &c. *Ante*, 183, &c.

^c Stat. 2 W. IV. c. 39. § 8.

^d Millard v. Millman, 8 Moore & S. 63. 2 Dowl. Rep. 723. S. C.

^e Barnett v. Harris, 2 Dowl. Rep. 186. 6 Leg. Obs. 236. S. C. and see Chapm. K. B. 2 *Addend.* 118. Athert. Pr. 29, &c.

^f As to the writ of *habeas corpus*, and manner of removing prisoners under it, from the custody of the sheriff, &c. into the custody of the marshal of the King's

Bench, or warden of the *Fleet* prison, see Tidd *Prac.* 9 Ed. 347, &c. And for the proceedings on the removal of prisoners to the King's Bench or *Fleet* prison, before or after declaration, see *id.* 349, 50.

^g Gadderer v. Sheppard, 4 Dowl. Rep. 577. 11 Leg. Obs. 498. S. C.

^h *Ante*, 186. Tidd *Prac.* 9 Ed. 357, &c.

ⁱ *Ante*, 65, 6. 185. Tidd *Prac.* 9 Ed. 345.

^k Append. to Tidd *Sup.* 1833, p. 289. and see Barnett v. Harris, 2 Dowl. Rep. 186. 6 Leg. Obs. 236. S. C.

in custody of marshal, or warden.

Time for pleading, in actions against prisoners.

Rule to plead.

Demand of plea.

Prisoner in custody on criminal account, not chargeable in civil action, without leave.

rule of all the courts^a, it is ordered, that "in all actions against prisoners in the custody of the marshal of the marshalsea, or of the warden of the *Fleet*, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody."

Where a prisoner has been served with a rule to plead, it is unnecessary to indorse a notice to plead on the declaration^b; and the want of a rule to plead is waived, by the defendant's taking out a summons for time to plead^c. A demand of plea is necessary, when the defendant is in custody of the marshal of the King's Bench prison^d; which demand may be made at the time of delivering the declaration^e: but when the defendant is in custody of the warden of the *Fleet*, a demand of plea is in general unnecessary^f.

It should be observed, however, that neither the plaintiff, nor a third person, can charge a prisoner with a declaration, or execution^g, in a *civil* action, when he is in custody of the sheriff, or of the marshal or warden, or in any other custody, on a *criminal* account, without leave of the court^h, or a judge; and a prisoner in custody on an *attachment* for a contempt, is holden to be a prisoner in custody on a *criminal* account, within the meaning of this ruleⁱ; though if he accept a declaration, and suffer judgment to go against him without complaining, he has waived the advantage which he might have taken of the irregularity, and shall be bound by it^k. And where one of two defendants was in custody of the marshal on a *criminal* charge, the court of King's Bench allowed him to be brought up on a *habeas corpus ad respondendum*, to be charged with a declaration^l. The proper mode of

^a R. T. 3 W. IV. reg. 2. 5 Barn. & 367.

Ad. 467. 2 Nev. & M. 288. 10 Bing. 153, 4. 1 Crompt. & M. 865, 6. 2 Dowl. Rep. 212.

^b Clementson v. Williamson, 1 Bing. N. R. 356. 1 Scott, 267. S. C.

^c Nugee v. McDonnell, 3 Dowl. Rep. 579. 10 Leg. Obs. 109. S. C.

^d Rose v. Christfield, 1 Durnf. & E. 591.

^e Rundell v. Champneys, 1 Dowl. & R. 186. R. H. 2 W. IV. reg. 1. § 43. 3 Barn. & Ad. 379. 8 Bing. 294. 2 Crompt. & J. 180.

^f Imp. C. P. 7 Ed. 231. 677. but see Davies v. Clippendale, 2 Bos. & P.

^g Pletwood v. Turty, Pr. Reg. 325.

^h Billing's case, T. Raym. 58. 1 Sid. 90. S. C. Rex v. Jackson, 1 Lev. 124. 1 Sid. 154. S. C. Bacon's case, 1 Lev. 146. Crackall v. Thompson, 1 Salk. 354. R. T. 2 Geo. I. (a.) Goodman v. —, 1 Dowl. Rep. 128. 3 Leg. Obs. 393, 4. S. C. per Littleale, J.

ⁱ Allgood v. Howard, Cas. Pr. C. P. 27. Pletwood v. Turty, Pr. Reg. 325.

^k Pepper v. Bawden, Cas. Pr. C. P. 31. and see Rose v. Christfield, 1 Durnf. & E. 591. Williams v. Scudamore, 1 Chit. R. 386. Tidd Prac. 9 Ed. 345.

^l Ess (or Williams) v. Smith, 3 Tyr.

charging a defendant, who is a prisoner in custody of the marshal, with an *attachment*, is by lodging the attachment with the sheriff, who will take the defendant thereon, as soon as he is out of the custody of the marshal ^a.

There was formerly a distinction between the rules of the King's Bench and Common Pleas, as to the time allowed for proceeding to trial or final judgment, against prisoners: In the former court, it was required that the plaintiff should proceed to *trial* or final judgment, within *three* terms inclusive after declaration, and should cause the defendant to be charged in execution, within *two* terms inclusive after such *trial* or judgment, of which the term, in or after which the trial was had, was reckoned as one ^b. In the Common Pleas, no notice was taken of the *trial*; the rule ^c being, that the plaintiff should proceed to *judgment*, within *three* terms inclusive after declaration, and charge the defendant in execution, within *two* terms inclusive after judgment against him ^d: But, by a general rule of all the courts ^e, "the plaintiff shall proceed to trial, or final judgment, against a prisoner, within *three* terms inclusive after declaration; and shall cause the defendant to be charged in execution within *two* terms inclusive after such trial or judgment; of which the term in or after which the trial was had shall be reckoned one." On this rule, where it appeared that the plaintiff in the *third* term inclusive after the declaration, had given notice of trial, and set his cause down, but it did not come on either at the sittings during or after the term, it was holden that as the plaintiff had done all-in his power to proceed to trial, within the time prescribed by the rule, the defendant was not supersedeable ^f. In order to charge a defendant in execution, in the King's Bench, the proceedings must formerly have been entered of record, and the judgment roll docketed and filed ^g: But, by a general rule of all the courts ^h, "in order to charge a defendant in execution, it shall not be necessary that the proceedings be entered of record."

Time for proceeding to trial, or final judgment, and execution, against prisoners.

To charge defendant in execution, proceedings need not be entered of record.

Rep. 363. 1 Dowl. Rep. 703. 6 Leg. Obs. 13. S. C.

^a Boucher v. Simms, 4 Dowl. Rep. 173. 2 Crompt. M. & R. 392. 11 Leg. Obs. 30, 31. S. C.

^b Heaton v. Wittaker, 4 East, 349.

^c R. E. 8 Geo. I. C. P.

^d Tidd Prac. 9 Ed. 362.

^e R. H. 2 W. IV. reg. 1. § 85. 3 Barn. & Ad. 386. 8 Bing. 300, 301. 2 Crompt. & J. 192.

^f Myers v. Cooper, 2 Dowl. Rep. 423.

8 Leg. Obs. 139, 40. S. C. per Littleale, J.

^g Imp. K. B. 10 Ed. 619. and see Tidd Prac. 9 Ed. 363.

^h R. H. 2 W. IV. reg. I. § 95. 3 Barn. & Ad. 388. 8 Bing. 303. 2 Crompt. & J. 195; and see Deemer v. Brooker, 1 Har. & W. 206. 3 Dowl. Rep. 576. 10 Leg. Obs. 76. S. C. Chandler v. Broughton, 11 Leg. Obs. 174.

When defendant is entitled to his discharge, for plaintiff's not declaring, &c.

Order for his discharge.

Lists to be presented to judges, of prisoners supersedeable, &c.

If the declaration be not delivered, and an *affidavit* thereof duly made and filed, when the defendant is in custody of the sheriff, &c. or if the plaintiff do not proceed to trial, or final judgment, or cause the defendant to be charged in execution, in due time, the defendant may be discharged out of custody, by writ of *supersedeas* or otherwise, according to the course of the court, on entering an appearance with the proper officer^a. In the King's Bench, if the plaintiff's attorney did not attend and shew cause against it, the judge would have formerly made an order for the defendant's discharge on the *first* summons, if the application were for not declaring: In the Common Pleas, the order on the *first* summons, if not consented to, was only an order *nisi*, unless cause were shewn within *six* days^b; and, in either court, if it were for not proceeding to judgment or execution in due time, there must have been *three* summonses, before the judge would have made an order for non-attendance; and, in a *country* cause, the order, on attendance, was not absolute in the first instance, but only an order *nisi*, unless cause were shewn within a limited time, to give the agent an opportunity of writing to his client for instructions^c. But, by a general rule of all the courts^d, "the order of a judge for the discharge of a prisoner, on the ground of a plaintiff's neglect to declare, or proceed to trial or final judgment, or execution, in due time, may be obtained at the return of *one* summons, served *two* days before it is returnable; such order, in *town* causes, being absolute, and in *country* causes, unless cause shall be shewn within *four* days, or within such further time as the judge shall direct."

The rules of the court of King's Bench, of *Trin.* 56^e, and *Mich.* 57 Geo. III.^e, requiring the marshal to present a list to the judges, of prisoners supersedeable, &c. were extended by a general rule of all the courts^f; by which it is ordered, that "the marshal of the King's Bench prison, and the warden of the *Fleet*, shall present to the judges of the courts of King's Bench, Common Pleas, and Exchequer, in their respective chambers at *Westminster*, within the first *four* days of every term, a list of all such prisoners as are supersedeable; shewing as to what actions, and on what account they are so, and as to what actions, if any, they still remain not supersedeable." And, by another rule of all the courts^g, "if by reason of any writ of error, special

^a Tidd *Prac.* 9 Ed. 368.

9 Ed. 367, 8.

^b Imp. C. P. 7 Ed. 677.

^c R. H. 2 W. IV. reg. I. § 86. 3

^c Tidd *Prac.* 9 Ed. 369.

Barn. & Ad. 386. 8 Bing. 301. 2

^d R. H. 2 W. IV. reg. I. § 69. 3

Crompt. & J. 192, 3.

Barn. & Ad. 387, 8. 8 Bing. 302. 2

Crompt. & J. 194.

^e *Id.* § 87. 3 Barn. & Ad. 386, 7. 8

Bing. 301, 2. 2 Crompt. & J. 193.

^f 5 Maule & S. 522. and see Tidd *Prac.*

order of the court, agreement of parties, or other special matter, any person detained in the actual custody of the marshal of the King's Bench prison, or warden of the *Fleet*, be not entitled to a *supersedeas* or discharge, to which such prisoner would, according to the general rules and practice of the court be otherwise entitled, for want of declaring, proceeding to trial or judgment, or charging in execution, within the times prescribed by such general rules and practice, then and in every such case, the plaintiff or plaintiffs, at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter, to the marshal or warden, upon pain of losing the right to detain such prisoner in custody, by reason of such special matter; and the marshal or warden shall forthwith after the receipt of such notice, cause the matter thereof to be entered in the books of the prison; and shall also present to the judges of the respective courts, from time to time, a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable."

By a rule of *Trin.* 19 Geo. III. K. B. "all prisoners who have been, or shall be in custody of the marshal, for the space of *six* months after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench prison, as to all such actions in which they have been, or shall be supersedeable." There is also a similar rule in the Common Pleas^a, for discharging prisoners out of the *Fleet* prison. And, by a subsequent rule of all the courts^b, "all prisoners who have been, or shall be in the custody of the marshal or warden, for the space of *one* calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench or *Fleet* prison, as to all such actions in which they have been, or shall be supersedeable." This rule, however, applies only to persons within the walls of the respective prisons^c.

Discharge of such prisoners.

For the relief of debtors, in execution for *small debts*^d, it is enacted by the statute 48 Geo. III. c. 123. that "all persons in execution

Relief of debtors, in execution for small debts, on

^a R. H. 6 & 7 Geo. IV. C. P. 11 Moore, 332. 3 Bing. 442. and see Tidd *Prac.* 9 Ed. 368.

^b R. H. 2 W. IV. reg. I. § 88. 3 Barn. & Ad. 387. 8 Bing. 302. 2 Crompt. & J. 193, 4.

^c *Siggers v. Brett*, 5 Barn. & Ad. 455.

^d For the relief which prisoners in execution are entitled to under the Lords' act, and other acts for the relief of insolvent debtors, see Tidd *Prac.* 9 Ed. 374,

&c. 388, &c. It is observable, however, that the discharge of insolvent debtors, on their own petition, under the Lords' act, seems to be now transferred from the judges of the superior courts, to the commissioners of the court for their relief, by the operation of the statutes 11 Geo. IV. & 1 W. IV. c. 38. § 10. 2 W. IV. c. 44. and 6 & 7 W. IV. c. 44; though they may still be brought up to the superior courts, at the instance of their creditors,

stat. 48 Geo.
III. c. 123.

Decisions
thereon.

"upon any judgment, in whatsoever court the same may have been obtained, and whether such court be or be not a court of record, for any debt or damages not exceeding the sum of *twenty* pounds, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of *twelve* successive calendar months, next before the time of their application to be discharged, as hereinafter mentioned, shall and may, upon his, her or their application for that purpose, in *term* time, made to some one of his Majesty's superior courts of record at *Westminster*, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution, by the rule or order of such court: Provided always, that in the case of any such application being made to be discharged out of execution, upon a judgment obtained in any of his Majesty's superior courts of record at *Westminster*, such application shall be made to such one of those courts only, wherein such judgment shall have been obtained; and that, whether the person so in execution, shall then be actually detained in the gaol or prison of the same court, or shall then stand committed on *habeas corpus*, to the gaol or prison of another court." This statute applies to persons in execution for damages, in an action of *assault*^a; or for criminal conversation^b. And a prisoner was discharged under it, notwithstanding he had been previously brought up under the compulsory clauses of the Lords' act, and refused to deliver in a schedule of his effects, and in consequence been remanded^c; and, in another case, although it appeared that he was entitled to an annuity, sufficient to satisfy the judgment^d. But the statute applies only to cases of persons in execution upon judgments in *civil* actions^e: and therefore, it has been holden, that one in custody on an *attachment* for nonpayment of money under *twenty* pounds, found due by an award made a rule of court, is not entitled to his discharge under it^f. So, where in a suit for subtraction of *tithes*, the ecclesiastical court ordered the defendant to pay a sum less than twenty pounds and

under the compulsory clauses of the Lords' act. *Ante*, 24. and see *Tidd Prac.* 9 Ed. 382, &c.

^a *Winter v. Elliot*, 1 Ad. & E. 24. 3 Nev. & M. 315. S. C.

^b *Goodfellow v. Robings*, 3 Bing. N. R. 1.

^c *Langdon v. Rossiter*, M'Clel. 6. 13 Price, 186. S. C.

^d *Wood v. Kelmerdine*, 2 Younge & J. 10; and see *ex parte White*, 1 Dowl.

Rep. 66. 2 Leg. Obs. 379, 80. S. C. per *Patteson*, J. *Manser v. Piercy*, 3 Moore & S. 558.

^e *Langdon v. Rossiter*, M'Clel. 6. 13 Price, 186. S. C.

^f *Rex v. Hubbard*, 10 East, 408. *Lewis v. Morland*, 2 Barn. & Ald. 61. and see *Rex v. Dunne*, 2 Maule & S. 201. *Rex v. Clifford*, 8 Dowl. & R. 58. *Pitt v. Evans*, 3 Dowl. Rep. 649. 10 Leg. Obs. 174. S. C.

costs; and the defendant, not having obeyed the order, was imprisoned under a writ *de contumace capiendo*, and having continued in prison more than *twelve* months, applied to be discharged, as a person in execution upon a judgment for a debt under twenty pounds, the court held, that he was not within the words or spirit of the act^a.

A defendant may be discharged out of custody, under the above act, where his debt amounts to twenty pounds precisely^b. And a person in custody more than *twelve* months, for nominal damages in an action of *ejectment*, not exceeding twenty pounds, is entitled to his discharge thereon, notwithstanding the property recovered by the verdict was worth much more than that sum^c. And although the sum for which a defendant has remained twelve months in execution exceeds twenty pounds, by the *one shilling* damages, in an action of *debt*, he is entitled to his discharge; the excess beyond that sum being considered only as constituting costs, according to the practice of the court, and costs being excluded, by the language of the statute, from forming a ground of further detention^d. But a defendant in execution for the costs of an *ejectment*, exceeding twenty pounds, where the damages were one shilling only^e, or for non-payment of costs in *ejectment*, exceeding twenty pounds, pursuant to a rule of court, and the Master's *allocatur* thereon^f, was holden not to be a person in execution upon a judgment for a debt or damages not exceeding twenty pounds, within the meaning of the statute; and therefore not entitled to be discharged out of custody. So, where a defendant was arrested for a sum under twenty pounds, and afterwards gave a warrant of attorney for the original debt and costs of the action, which together exceeded that sum, under which judgment was entered up, and he was taken in execution, the court of Common Pleas held, that he was not entitled to his discharge, under the above statute; as the warrant of attorney did not appear to have been improperly obtained from him, nor was he in custody at the time it was given^g. And a prisoner charged in execution for a debt exceeding twenty pounds, is not entitled to his discharge, though the excess be made up of *interest*, upon a sum

Further decisions.

^a Ex parte Kaye, 1 Barn. & Ad. 652.

^b Doe v. Reynolds, 10 Barn. & C. 481.

^c Thomson v. King, 4 Dowl. Rep. 582. 11 Leg. Obs. 356. S. C. per Patterson, J.

^d Doe d. Upton v. Benson, 1 Dowl. Rep. 15. 1 Leg. Obs. 95. S. C. per Littledale, J.

^e Doe v. Roe, 1 Dowl. Rep. 69. 2 Leg. Obs. 93. S. C. per Patterson, J.

^f Robinson v. Sundell, 6 Moore, 287. — v. White, 1 Dowl. Rep. 19. 1 Leg. Obs. 95. S. C. per Littledale, J.; and see 3 Moore & S. 798. (a).

^g Fogarty v. Smith, 4 Dowl. Rep. 595. 1 Har. & W. 644. 11 Leg. Obs. 274. S. C. per Patterson, J.

originally under twenty pounds ^a. A *plaintiff*, who has lain in prison more than *twelve* months, under an execution for the costs of a *nonsuit*, not amounting to twenty pounds, was holden, in one case ^b, to be entitled to be discharged under the above statute; but from a subsequent case, it seems, that the act does not apply to *plaintiffs* in execution, upon a judgment obtained by the defendant ^c.

Application for
discharge of pri-
soner, when and
how made.

In cases to which the statute applies, the prisoner is entitled, under it, to his discharge absolutely, as a matter of right ^d; and he is so entitled, although he has been out occasionally on day rules, during the *twelve* months ^e. With regard to the *time* of making the application, where a defendant was charged in execution on the 26th of *November* 1830, for a debt not exceeding twenty pounds, and continued in prison until the 25th of *November* following, he was holden to be entitled to his discharge, under the above statute, on that day ^f. The rule for discharging him, in the King's Bench, was absolute in the first instance, after due notice of the application had been given to the plaintiff ^g: In the Common Pleas, it was in the first instance only a rule *nisi* ^h: But, by a general rule of all the courts ⁱ, "a rule or order for the discharge of a debtor, who has been detained in execution a year, for a debt under *twenty* pounds, may be made absolute in the first instance, on an *affidavit* of notice given *ten* days before the intended application; which notice may be given before the year expires." Notice of motion, however, must be given, or a rule *nisi* only will be granted ^k: And, in the Exchequer, where a defendant is in custody of any other officer than the warden of the *Fleet*, a copy of causes, certified by the gaoler, or verified by *affidavit*, must be produced, on applying for his discharge ^l. On an application for the discharge of a prisoner, under the above act, notice having been given of his intention to apply on the last day of the preceding term, or as

^a *Cooper v. Bliss*, 3 Moore & S. 797.
2 Dowl. Rep. 749. S. C.

^b *Roylance v. Hewling*, 3 Maule & S.
282.

^c *Tinnmouth v. Taylor*, 10 Barn. & C.
114. 5 Man. & R. 44. S. C.

^d *Stacey v. Fieldsend*, 1 Dowl. Rep.
700.

^e *Boughey v. Webb*, 4 Dowl. Rep. 320.
11 Leg. Obs. 182. S. C.

^f *Anon.* 1 Dowl. Rep. 150. *per Little-
dale*, J.

^g *Davies v. Rogers*, 2 Barn. & C. 804.
4 Dowl. & R. 361. S. C.

^h *Ex parte Neilson*, 7 Taunt. 37. *Mag-
nay v. Gilkes*, *id.* 467; and see *Findon v.
Horton*, 8 Moore, 80. *Tidd Prac.* 9 Ed.
388.

ⁱ R. H. 2 W. IV. reg. I. § 90. 3
Barn. & Ad. 388. 8 Bing. 302. 2
Crompt. & J. 194.

^k *Jones v. Fitzaddams*, 2 Dowl. Rep.
111. 1 Crompt. & M. 855. 3 Tyr. Rep.
904. 6 Leg. Obs. 493. S. C. *Moore v.
Clay*, 4 Dowl. Rep. 5. *per Coleridge*, J.

^l *Short v. Williams*, 4 Dowl. Rep. 357.
1 Tyr. & G. 231. 11 Leg. Obs. 374. 5.
S. C.

soon after as counsel could be heard, the court would not grant the rule ^a. A debtor, who seeks his discharge under the above statute, must serve his notice on the plaintiff in the action, if he can be met with, and not on the attorney ^b; and where the plaintiff is dead, it is necessary to shew that there is no personal representative, before service of notice on the plaintiff's attorney will be deemed sufficient ^c. Service of the notice is not sufficient, unless it be left with some person necessarily in communication and connexion with the creditor himself ^d: but where a creditor's residence cannot be discovered, the service it seems may be on his attorney ^e. Such an application can only be disposed of in *term* time ^f; the court having no power to order cause to be shewn at chambers ^g. In making the motion, the cause stated in the notice must correspond with that in which the prisoner is in execution ^h: And where a defendant had remained in custody more than *twelve* months, on *two* judgments, for *sixteen* pounds each, at the suit of the same plaintiff, it was holden that there must be a separate motion in each case ⁱ.

By the statute 25 Geo. III. c. 45 ¹, for reducing the time for the imprisonment of debtors, committed to prison, upon prosecutions in courts of conscience in *London*, *Middlesex*, and the borough of *Southmark*, to the same period in each court, "no person or persons whomsoever, being a debtor or defendant, and who have been, or shall be committed to any gaol or prison, by order of any court, or commissioners authorized by virtue of any act or acts of parliament, to constitute or regulate any court or courts for the recovery of small debts, in the city of *London*, in the county of *Middlesex*, and town and borough of *Southmark* in the county of *Surrey*, where the debt does not exceed *twenty* shillings, shall be kept or continued in custody, on any pretence whatsoever, more than *twenty* days from the time of his, her or their, commitment to prison; and where

Time for imprisonment of debtors, committed to prison by courts of conscience.

^a Jameson v. West, 11 Leg. Obs. 214. *per Patteson*, J.

^b Kelly v. Dickinson, 1 Dowl. Rep. 546. 5 Leg. Obs. 318. S. C. *per Parke*, J. Gibbs v. Grant, 11 Leg. Obs. 85. Gordon v. Twine, 4 Dowl. Rep. 560. 11 Leg. Obs. 355, 6. S. C. *per Coleridge*, J.

^c *Ex parte Richer*, 4 Dowl. Rep. 275. 1 Har. & W. 518. 11 Leg. Obs. 100. S. C.

^d George v. Fry, 4 Dowl. Rep. 273. 11 Leg. Obs. 45, 6. S. C. *per Littledale*, J. Shilcock v. Passman, 7 Car. & P. 289. *per*

Alderson, B.

^e Wilson v. Mokler, 1 Dowl. Rep. 549. 5 Leg. Obs. 431. S. C. *per Parke*, J. Shilcock v. Passman, 7 Car. & P. 289. *per Alderson*, B.

^f Jones v. Fitzaddams, 1 Crompt. & M. 855. 3 Tyr. Rep. 904. 2 Dowl. Rep. 111. 6 Leg. Obs. 493. S. C.

^g Kelly v. Dickinson, 1 Dowl. Rep. 537.

^h Anon. 3 Leg. Obs. 76. *per Littledale*, J.

ⁱ § 1.

" the debt does not amount to, or exceed the sum of *forty* shillings,
 " more than *forty* days from the time of his, her or their commitment
 " as aforesaid ; and all gaolers, keepers or turnkeys, are thereby di-
 " rected to discharge such persons accordingly."

In *London*.

This statute was repealed, as to *London*, by the late act for amend-
 ing and consolidating the acts of parliament, for the recovery of small
 debts in the city of *London* ^a, &c. by which it is enacted ^b, that " no
 " person or persons whomsoever, being a debtor or debtors, de-
 " fendant or defendants, who shall be committed to gaol or prison,
 " by order of the court of Requests, shall be kept or continued in
 " custody, on any pretence whatsoever, (except in the cases therein-
 " after otherwise provided for,) for any longer space or spaces of time
 " from the time of his or her commitment to prison, than is or are
 " thereinafter limited ; that is to say, where the debt, exclusive of
 " costs, shall amount to *twenty* shillings and no more, then he, she or
 " they shall be kept or continued in custody *eight* days, and where
 " the debt, exclusive of costs, shall be more than the sum of *twenty*
 " shillings, then he, she or they shall be kept or continued in custody,
 " as many days as shall be equal to the number of sums of two shil-
 " lings and sixpence in the amount of such debt ; unless the plaintiff
 " or plaintiffs shall be sooner satisfied, and signify the same in writ-
 " ing under his, her or their hand or hands, to the officer who shall
 " have executed the process ; which officer, upon producing the
 " same to the gaoler, shall thereupon forthwith discharge such
 " debtor or debtors out of custody. Provided always, neverthe-
 " less, that all and every person and persons, who shall be taken in
 " execution, under or by virtue of any process issuing from or out of
 " the said court, and who, at the time of being taken into custody,
 " or during his, her or their imprisonment, shall have more than one
 " execution against him, her or them, in the said court, shall be
 " imprisoned the limited time for the first execution, and afterwards,
 " half the limited time only for and in respect of each other execu-
 " tion ; that is to say, after the limited time is expired on the first
 " execution, the imprisonment shall commence on the second execu-
 " tion, and continue half the limited time only, and after half the
 " limited time is expired on the second execution, the imprisonment
 " shall commence on the third execution, and so on, until he, she or
 " they shall have been imprisoned the limited time for the first exe-
 " cution, and afterwards half the limited time only for and in respect

When there are
 several execu-
 tions.

^a 5 & 6 W. IV. c. xciv. § 2.

^b § 47.

“ of each other separate execution to be issued against him, her or them, in the said court, previously to his, her or their being taken into custody, or during his her or their imprisonment; any law statute or usage to the contrary notwithstanding.”^a

By the late court of requests' act for *Westminster*^b, it is enacted, that In *Westminster*.
 “ no person or persons whomsoever, being a debtor or debtors, defendant or defendants, who shall be committed to gaol or prison by order of the said court of requests, shall be kept or continued in custody, on any pretence whatsoever, (except in the cases therein provided,) for any longer space of time than *seven* days; and the keeper and keepers of any such gaol or prison, is and are thereby directed and required, to discharge such person or persons accordingly.” And there is a *proviso* in the act^c, that “ all and every person or persons, who shall be taken in execution, under or by virtue of any process issuing from or out of the said court, and who at the time of being taken into custody, or during his, her or their imprisonment, shall have more than one execution against him, her or them, in the said court, shall be imprisoned during the time limited by that act, for and in respect of each other execution; that is to say, after the limited time is expired on the first execution, the imprisonment shall commence on the second execution; and after the limited time is expired on the second execution, the imprisonment shall commence on the third execution, and so on, until he, she or they shall have been imprisoned the time limited by that act, for and in respect of each other separate execution, to be issued against him, her or them, in the said court, previously to his, her or their being taken into custody, or during his, her or their imprisonment; any law, statute or usage, to the contrary notwithstanding.”

When there are several executions.

^a Stat. 5 & 6 W. IV. c. xciv. § 49. ^c § 67.

^b 6 & 7 W. IV. c. cxxxvii. § 64.

CHAP. XVI.

Of the REMOVAL of CAUSES, from INFERIOR COURTS.

Removal of causes from *Chester* and *Wales*, into court of Exchequer, on administration of justice act.

Rules of court thereon.

Times and modes of proceeding appointed thereby.

THE jurisdiction of his Majesty's court of Session of the county palatine of *Chester*, and of the judges thereof, and of his court of Exchequer of the said county palatine, and of the Chamberlain and Vice Chamberlain thereof, and also of his judges and courts of Great Sessions, in the Principality of *Wales*, having been abolished by the administration of justice act^a, it was enacted thereby, that, "all suits at law then depending in any of the said courts, shall be transferred to the court of Exchequer, there to be dealt with and decided according to the practice of the said court of Exchequer, or of the court from whence the same shall be transferred, according to the discretion of the court to which the same shall be transferred; which court shall, for the purpose of such suits only, be deemed and taken to have all the power and jurisdiction, to all intents and purposes, possessed before the passing of that act, by the court from whence such suit shall be removed." On this act, rules of court were made, in the Exchequer of Pleas, by one of which it is ordered; that "as to all suits at law depending in any of the said courts, on the *twelfth* day of *October* then last past, the same shall be dealt with and decided according to the practice of the said court of Exchequer; unless that court, or a baron thereof at chambers, shall, upon special application, upon notice to an adverse party, otherwise direct." ^b

Particular times and modes of proceeding are appointed by the above rules, in cases where process shall have been served, and the plaintiff shall not have declared; or in which a declaration has been delivered or filed in the court of Sessions; or interlocutory or final judgment shall have been signed, in any of the courts abolished by

^a 11 Geo. IV. & 1 W. IV. c. 70. § 14. And for cases determined on the above act, see *Jones v. Clark*, 1 Crompt. & J. 447. *Williams v. Williams*, *Id.* 387. 1 Tyr. Rep. 351. S. C. Same *v. Same*, 2 Crompt. & J. 55. *Rees v. Rees*, 2 Tyr. Rep. 384.

Thomas v. Williams, 3 Dowl. Rep. 665. 10 Leg. Obs. 158. S. C. *Howell v. Brown*, 3 Dowl. Rep. 805; and see *Tidd Prac.* 9 Ed. 397.

^b R. M. 1 W. IV. reg. III. § 1. 1 Crompt. & J. 283. 1 Tyr. Rep. 164.

that act. And it is thereby further ordered^a, that "any proceeding taken in any court abolished by the said act, may be continued by way of suggestion, in the said court of Exchequer; such suggestion being subject to correction, upon a summons for the purpose, by any of the barons of that court."

When an action is commenced in an inferior court, it may be removed into the court of King's Bench, Common Pleas, or Exchequer, by writ of *certiorari*^b, or *habeas corpus*^c, from inferior courts of record; or by writ of *pone*, *recordari facias loquelam*, or *accedas ad curiam*^d, from such as are not of record^e. In an action or suit on the common law side of the court of the Vice Warden of the Stannaries of Cornwall, it is enacted by a late statute^f, that "it shall be lawful for the court of King's Bench at Westminster, on the application of any party to any such action or suit, on special and sufficient cause shewn by affidavit, to the satisfaction of the said court of King's Bench, that an impartial or sufficient trial cannot be had in such court of the Vice warden, to remove, by writ of *certiorari*, all proceedings which may have been had in such action or suit, and to deal therewith, and to make such orders respecting the same, and the future trial of, and proceedings in such action or suit, as to the said court of King's Bench shall seem meet."

Means of removing actions from inferior courts.

Removal of cause by *certiorari*, from Stannary court of Cornwall, into K. B.

When special bail were put in upon a *habeas corpus*, and notice thereof given to the plaintiff's attorney, he was formerly allowed twenty-eight days in the King's Bench, or, in the Common Pleas, twenty days^g after they were put in, to except to them: But, by a general rule of all the courts^h, "the time allowed for excepting to bail, put in upon a *habeas corpus*, shall be twenty days."

Time allowed for excepting to bail, on *habeas corpus*.

^a R. M. 1 W. IV. reg. III. § 5. 1 Crompt. & J. 284, 5. 1 Tyr. Rep. 165.

^b For the nature of the writ of *certiorari*, and when it lies, in general, for the removal of causes from inferior courts, see Tidd *Prac.* 9 Ed. 398, &c. or may be had after judgment therein, for the purpose of obtaining execution, *id.* 401, &c.

^c For the mode of proceeding by *habeas corpus*, for the removal of causes from inferior courts, see Tidd *Prac.* 9 Ed. 403, &c.

^d For the means of removing causes from inferior courts, by writ of *pone*, *recordari facias loquelam*, or *accedas ad*

curiam, see Tidd *Prac.* 9 Ed. 414, &c.; and see stat. 1 W. IV. c. 7. § 9. as to the return of these and other writs, for removing suits from inferior courts, into the Common Pleas at Lancaster.

^e For the practice, on the removal of causes in general from inferior courts, see Tidd *Prac.* 9 Ed. 397, &c.

^f 6 & 7 W. IV. c. 106. § 42.

^g R. M. 1654. § 11. R. H. 13 & 14 Car. II. C. P.; and see Tidd *Prac.* 9 Ed. 409;

^h R. H. 2 W. IV. reg. I. § 25. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Crompt. & J. 175.

Time for giving rule to declare, on removal of cause.

On the removal of a cause from an inferior court, by writ of *pone*, or *recordari*, &c. the rule to declare might formerly have been given, in the King's Bench, within *fourteen* days^a, or, in the Common Pleas, within *four* days after the end of the term^b: And now, by a general rule of all the courts^c, "where a cause has been removed from an inferior court, the rule to declare may be given within *four* days after the end of the term in which the writ is returned."

Demand of declaration necessary, before *non pros* can be signed.

When the writ of *pone* or *recordari*, &c. was brought by the defendant, if the return had been filed on or before the appearance day, there was formerly no occasion to demand a declaration in writing^d; but otherwise a written demand was necessary^e: And now, by a general rule of all the courts^f, "no judgment of *nonpros* shall be signed, for want of a declaration, until *four* days next after a demand^g thereof shall have been made in writing, upon the plaintiff, his attorney or agent, as the case may be."

Uniformity of process act does not extend to inferior courts.

The uniformity of process act^h does not, we have seenⁱ, extend to any cause removed into either of the superior courts of law at *Westminster*, by writ of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise. The proceedings therefore, in actions of *replevin*, and other personal actions, commenced in *inferior* courts, and removed from thence into *superior* ones, are not affected by that act^k.

Writs for removing suits from inferior courts, into C.P. at *Lancaster*, how returnable.

Previously to the statute 1 W. IV. c. 7. persons suing in the inferior courts of the county palatine of *Lancaster*, were often vexatiously delayed in the recovery of their just demands, by the removal of their suits into the court of Common Pleas at *Lancaster*, by reason that the writs, whereby the same were removed, could be made returnable only at the assizes holden for the said county^l; for remedy whereof it is enacted, by the above statute^l, that "all writs "of *pone loquelam*, *recordari facias loquelam*, *accedas ad curiam*, "and all other writs lawfully issued out of the Chancery of the said

^a *Edwards v. Dunch*, 11 East, 183.

^b *Allen v. Millward*, H. 30 Geo. III. C. P. Imp. C. P. 7 Ed. 533, 4.; and see *Tidd Prac.* 9 Ed. 417, 18.

^c R. H. 2 W. IV. reg. I. § 37. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.; and see R. H. 2 W. IV. reg. 1. § 38. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

^d *James v. Moody*, 1 H. Blac. 281. 2 Moore, 643. (c.)

^e *Taylor v. Blaxland*, Pr. Reg. 370.

Cas. Pr. C. P. 55. S. C.; and see *Tidd Prac.* 9 Ed. 417, 8.

^f R. T. 1 W. IV. reg. IV. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 471.

^g *Append. to Tidd Sup.* 1832, pp. 106, 7.

^h 2 W. IV. c. 39.

ⁱ *Ante*, 17, 18.

^k *Ante*, 60.

^l § 9.

“ county palatine of *Lancaster*, for the removal of causes from the
“ inferior courts of the said county, into the said court of Common
“ Pleas, which shall be issued after the expiration of *fourteen* clear
“ days next after the passing of that act, shall be made returnable
“ on the *first Wednesday* in the month, next after the issuing thereof,
“ unless in the meantime the assizes shall be holden for the said
“ county, and if the assizes shall be holden in the meantime, then on
“ the first or last day of such assizes, as the case may be, next after
“ the issuing thereof; and that all such writs, made returnable at
“ any other time than according to the provision thereinbefore con-
“ tained, shall be utterly null and void to all intents and pur-
“ poses.”

CHAP. XVII.

Of the DECLARATION.

Declaration,
how treated of.

IN the present Chapter, it is intended to treat of the *declaration*, and manner in which it is affected by the uniformity of process act ^a; with the alterations which have been made therein, by rules of court, and judicial decisions. These alterations principally relate to the time and mode of declaring, and the consequences of not declaring in due time; and may be classed under the following heads: 1. the *time* for declaring, absolutely or *de bene esse*, and mode of obtaining further time; 2. the *title* of the declaration; 3. the *venue*; 4. the *commencement* of the declaration; 5. its *correspondence* with the process; 6. the *form* of declaring on bills, or notes, &c.; 7. when *several* counts are prohibited, or allowed; 8. the *conclusion* of the declaration; 9. when it is *delivered* or *filed*, absolutely or *de bene esse*; 10. the judgment of *non pros* for not declaring; and lastly, as incident thereto, the *rule* to declare, and *demand* of declaration.

What.

In chief.

The declaration is a specification, in legal form, of the circumstances which constitute the cause of action; and it is either in *chief*, or by the *bye* ^b. When the defendant has entered an appearance, or the plaintiff has appeared for him, on *serviceable* process, or special bail has been put in and perfected on *bailable* process, the plaintiff may declare against him in *chief*, and proceed thereon to judgment and execution.

By the bye.

In the King's Bench, when the defendant had appeared and filed bail, upon a bill of *Middlesex*, or *latitat*, &c. or the plaintiff had filed it for him according to the statute, the plaintiff might formerly have declared *by the bye*, in as many different actions as he thought fit, at any time before the end of the term after the return of the process ^c. It was also a settled point, that when bail was filed by the defendant, upon a bill of *Middlesex*, or *latitat*, &c. any other person,

^a 2 W. IV. c. 39.; and as to the declaration in general, see Tidd *Prac.* 9 Ed. 419, &c.

^b As to declarations in *chief*, and by the *bye*, and the time and mode of declaring

absolutely, or *de bene esse*, see Tidd *Prac.* 9 Ed. Chap. XVII. p. 419, &c.

^c R. M. 10 Geo. II. *reg.* 1. (b.) K. B. but see Gilb. K. B. 310.

besides the plaintiff, might have declared against him *by the bye*, at any time during the term wherein the process was returnable, *sedente curia*^a. In actions by *original* in the King's Bench, the practice of declaring by the bye was similar to that in the Common Pleas; where the *same* plaintiff was allowed to declare against the defendant by the bye, in as many different actions as he might think fit, at any time before the end of the next term after the return of the process^b: But he could not have declared by the bye, after the end of that term^c; nor could any other person have declared by the bye, except the plaintiff^d. In the Exchequer of Pleas, the plaintiff was allowed to declare by the bye, at any time during the term in which the process was returnable^e; or, as it seems, before the end of the term next after that in which the process was returnable^f; but no person could declare by the bye, except the original plaintiff^g. As it is declared, however, by the uniformity of process act^h, that the writs thereinbefore authorized shall be the only writs for the commencement of *personal* actions, in any of the courts therein mentioned, in the cases to which such writs are applicableⁱ, and as the proceedings under that act may, generally speaking, be had in *vacation*, as well as in *term* time, it has been doubted, whether the practice of declaring *by the bye* is not altogether abolished^k. But it seems that the *same* plaintiff may, after the defendant has appeared, declare against him *by the bye*, for a different cause of action from what is expressed in the process^l; though it is generally agreed, that no other person, except the plaintiff, can declare by the bye.

The plaintiff was formerly allowed to declare *absolutely* against the defendant after appearance, at any time before the end of the next term after the return of the process^m. And, in order to expedite the cause, it was formerly usual, in the King's Benchⁿ, and Exche-

Time formerly allowed to declare, absolutely, or *de bene esse*.

^a Dennis v. Mannaring, Poph. 145.

Jones (or Banda) v. Bodinner, Carth. 377.

¹ Salk. 2. S. C. Gilb. K. B. 310. 342.

Sulyard v. Harris, 4 Bur. 2181. Smith v. Muller, 3 Durnf. & E. 627.

^b Wreake v. Robbins, Pr. Reg. 142.

^c Dunn v. Hutt, Barnes, 346.

^d Methwin v. Pople, Cas. Pr. C. P. 6.

^e Man. Ex. Pr. 181, 2.

^f Dax Excheq. 1 Ed. 53.

^g Man. Ex. Pr. 182. Griffith v. Humphreys, 3 Younge & J. 218; and see Tidd Prac. 9 Ed. 419. 424, 5.

^h 2 W. IV. c. 39. § 21.

ⁱ Ante, 59.

^k Sup. to Petersd. Pr. 20. 1 Chit. Archb. Pr. 180. 4 Nev. & M. 877. (a.)

^l Sed quare; and see Athert. Pr. 89, 90. 102, &c.

^m Tidd Prac. 9 Ed. 422, &c.

ⁿ Brook v. Bennett, 3 Smith, R. 432. Steward v. Lund, 12 East, 116. M'Quoick v. Davis, 2 Chit. R. 164. Hill v. Parker, id. 165. Bell v. Vincent, 7 Dowl. & R. 233.

quer^a, to serve the process on the return day, and to file the declaration *de bene esse*, and give notice thereof to the defendant, on the same day; and, in the Common Pleas, notice of the declaration being so filed might have been given on the return day of the writ, at the time of serving it^b. But this practice having been productive of great inconvenience, by subjecting the defendant to the payment of unnecessary costs, if he were inclined to settle the action in the first instance, a general rule was made in all the courts^c, that "no declaration *de bene esse* should be delivered^d, until the expiration of six days from the service of the process, in the case of process which is not bailable, or until the expiration of six days from the time of the arrest, in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest;" which rule applied to declarations filed, as well as delivered, *de bene esse*^e. And as this rule might have enabled a defendant, when served with process, or arrested within six days of the end of an issuable term, to prevent the plaintiff from declaring, so as to have a plea of the term^f, and proceed to trial at the next assizes, it was ordered, by a subsequent rule^g, that "in Hilary and Trinity terms, a plaintiff, in any country cause, might file or deliver a declaration *de bene esse*, within four days after the end of the term, as of such term." These rules, however, were virtually abolished by the uniformity of process act^h; and it is now settled, agreeably to that act, that "when the defendant has entered an appearance, or the plaintiff has appeared for him, on serviceable process, the plaintiff may declare absolutely, (or, as it is sometimes, though improperly, called in chiefⁱ), against him, either in term or vacation, except between the tenth of August and twenty-fourth of October, at any time before the end of the next term after the eighth day inclusive, from the service of the writ. And if a defendant enter an appearance to a writ of summons, before the expiration of the eight days allowed for that purpose, the plaintiff may,

Time now allowed, on serviceable process.

^a Mayor, &c. of Derby v. Wheeldon, 9 Price, 153. Nock v. Southall, M'Clel. 659. 13 Price, 800. S. C.

^b Haynes v. Jones, 3 Taunt. 404. Wallbancke (or Wallbank) v. Abbott, 8 Taunt. 127. 1 Moore, 573. S. C.; and see Tidd Prac. 9 Ed. 456.

^c R. T. 1 W. IV. reg. VI. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 472.

^d The usual words "*filed or*" are here omitted. Chit. Pr. 77. n.

^e Giles v. Gale, M. 1831. C. P. 3 Leg. Obs. 98.

^f Chit. Pr. 77. n.

^g R. H. 2 W. IV. reg. III. 3 Barn. & Ad. 391. 8 Bing. 306. 2 Crompt. & J. 199, 200.

^h 2 W. IV. c. 39; and see Fish v. Palmer, 2 Dowl. Rep. 460. per Parke, J.

ⁱ R. M. 1 W. IV. reg. II. § 11. 1 Crompt. & J. 279. 1 Tyr. Rep. 161, 2. R. M. 3 W. IV. reg. II. 4 Barn. & Ad. 3, 4. 9 Bing. 446. 1 Crompt. & M. 5.

it seems, immediately declare against him^a; but otherwise, he cannot declare until *eight* days after the service, inclusive of the day of serving the writ, have expired: if he do, he will not be entitled to the costs of his declaration^b. And as the plaintiff may enter an appearance for the defendant, when he has been served with a writ of *summons*, or a *distringas* has been executed, there seems to be no occasion for his declaring *de bene esse*, on serviceable process.

Where special bail has been put in and perfected for the defendant, on bailable process, the plaintiff may declare *absolutely* against him, in term or vacation, with the exception before mentioned, at any time before the end of the next term after the execution of the writ. And, by a general rule of all the courts^c, it is ordered, that "upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff, at the expiration of *eight* days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse*, in case special bail shall not have been perfected: And if there be several defendants, and one or more of them shall have been served only, and not arrested, and the defendant or defendants so served, shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in *chief*^d, and *de bene esse* against the defendant or defendants who shall have been arrested, and shall not have perfected special bail."

On bailable process.

When one defendant is arrested, and another served.

If the plaintiff be not ready to declare in due time, he may obtain a side-bar or treasury rule from the clerk of the rules in the King's Bench^e, or one of the secondaries in the Common Pleas^f, for time to declare; and, in the Common Pleas, there is no difference in this respect, between a rule for time to declare in *replevin*, and in other actions^g. In the Exchequer of Pleas, the mode of obtaining time to declare was by summons, and order of a baron^h; and the time given was in the discretion of the baron making the order, regulated by the cause of action, and circumstances of the caseⁱ. But, by a general rule of all the courts^k, "the plaintiff may have a rule for time to declare in the court of Exchequer, as well as in the other courts." If the plaintiff be still unprepared, he may obtain rules for *further*

Rule for time to declare.

For further time.

^a *Morris v. Smith*, 2 Crompt. M. & R. 314. 1 Gale, 187. 4 Dowl. Rep. 198. 10 Leg. Obs. 414, 15. S. C.

^b *Fish v. Palmer*, 2 Dowl. Rep. 460. 8 Leg. Obs. 301. S. C.

^c R. M. 3 W. IV. reg. 11. 4 Barn. & Ad. 3, 4. 9 Bing. 446. 1 Crompt. & M. 5.

^d *Ante*, 204.

^e Append. to Tidd *Prac.* 9 Ed. 163.

^f *Id. ib.*

^g *Craven v. Vavasour*, 5 Taunt. 35.

^h *Dax*, Pr. 1 Ed. 54.

ⁱ *Price*, Pr. 216; and see Tidd *Prac.* 9 Ed. 423, 4. 484.

^k R. H. 2 W. IV. reg. I. § 38. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

Peremptory rule to declare.

Plaintiff must declare within a year.

time to declare ^a, which were formerly granted from the beginning to the end of the term, and from the end of one term to the beginning of another, alternately; but are now usually limited to a month ^b, though a longer time may be obtained if necessary ^c. And where one of two defendants is in custody, and the plaintiff is proceeding to outlawry against the other, he may obtain time to declare against the prisoner, by application to the court or a judge, until the outlawry of the other defendant is perfected ^d. But, after several rules have been obtained, the courts will make a *peremptory* one, for the plaintiff to declare. The rule for this purpose, in the King's Bench, was absolute in the first instance ^e; and drawn up on a motion paper signed by counsel: In the Common Pleas, it was formerly a rule to shew cause ^f: but, by a general rule of all the courts ^g, "a rule to declare *peremptorily*, may be absolute in the first instance."

Mr. Justice *Buller* having expressed an opinion, in the case of *Worley v. Lee* ^h, that by the general rules of law, a plaintiff must have declared against a defendant within *twelve months* after the return of the writ, though, by the rules of the court, if he did not deliver a declaration within two terms, the defendant might have signed a judgment of *non pros*, it was settled, agreeably to that opinion, that unless he took advantage of the plaintiff's neglect, by signing a judgment of *non pros*, the plaintiff might deliver his declaration, at any time within a *year* next after the return of the writ ⁱ. But, by a general rule of all the courts ^k, "a plaintiff shall be deemed out of court, unless he declare within *one year* after the process is returnable." And where an action is removed from an inferior court, by writ of *habeas corpus*, the cause is not out of court, till a year after the return of the writ by which the action is removed ^l. Therefore, where a party, arrested in a suit commenced in a borough court,

^a Append. to Tidd *Sup.* 1833. p. 290.

^b Chit. Archb. Pr. 4 Ed. 219.

^c Richardson v. Pollen, 1 Hodges, 75; and see 3 Chit. Gen. Pr. 447.

^d De Lannoy v. Benton, 1 Scott, 386.

^e Append. to Tidd *Prac.* 9 Ed. Chap. XVII. § 5.

^f *Id.* § 6; and see Tidd *Prac.* 9 Ed. 424. 487, 6.

^g R. H. 2 W. IV. reg. 1. § 39. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

^h 2 Durnf. & E. 112.

ⁱ Penny v. Harvey, 3 Durnf. & E. 123, 4. Sherson v. Hughes, 5 Durnf. & E. 35. Parsons v. King, 7 Durnf. & E. 7. but see Barnes v. Geering, 12 Mod. 217. Sykes v. Bauwens, 2 New Rep. C. P. 404. Morton v. Grey, 9 Barn. & C. 544; and see Tidd *Prac.* 9 Ed. 421. Kirby v. Snowden, 4 Dowl. Rep. 191. 10 Leg. Obs. 382. S. C.

^k R. H. 2 W. IV. reg. I. § 35. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 178.

^l Norrish v. Richards, 5 Nev. & M. 266. 1 Har. & W. 437. S. C.

removes a cause by *habeas corpus* into the King's Bench, and no further proceedings are had, the suit is not determined, so as to support an action for a malicious arrest, until a year after the return of the *habeas* ^a. But proof, in an action for a malicious arrest, that no declaration was filed or delivered within a year after the return of the writ, has been deemed sufficient to shew a determination of the suit ^b. And the proceedings were stayed in an action against the sheriff, where the plaintiff had not declared within a year after the service of a writ of *summons*; although the proceedings had been stayed in the mean time, by a rule to shew cause under the interpleader act, which rule was ultimately discharged ^c. The rule, however, as to declaring within a year, does not apply to the writ of *quare impedit* ^d: But, according to the rule of the common law, which applies to all forms of action, the plaintiff in *quare impedit* ought to declare within a year; which is to be reckoned from the time of the return of the writ, and not from the day of the defendant's appearance ^e.

The declaration must be *entitled*, on the face of it, in the court in which the action is brought ^f: and it was formerly necessary that it should be entitled in term. When the cause of action would admit of it, it was usual in practice to entitle the declaration generally, of the term in which the writ was returnable; and though filed or delivered, it could not regularly have been entitled of a subsequent term ^g. But the declaration must always have been entitled after the time when the cause of action was stated to have accrued: Therefore, when the cause of action was stated to have accrued after the first day of the term in which the writ was returnable, the declaration must have been entitled of a subsequent day in that term, and not of the term generally; for a general title referred to the first day of the term, and upon such a title it would have appeared that the action was commenced before the cause of action accrued ^h. As the proceedings, however, may now be had, except at certain times, in term or vacation ⁱ, it was ordered by a general rule of all the courts ^j, that

Title of declaration, &c.

^a *Norrish v. Richards*, 5 Nev. & M. 268. 1 Har. & W. 437. S. C.

^b *Pierce v. Street*, 3 Barn. & Ad. 397.

^c *Unite v. Humphery*, 3 Dowl. Rep. 532. 9 Leg. Obs. 510, 11. S. C. *per Patterson*, J.

^d *Barnea v. Jackson*, 1 Bing. N. R. 545. 1 Scott, 520. 1 Hodges, 59. 3 Dowl. Rep. 404. 9 Leg. Obs. 395, 6. S. C.

^e *Ripling (or Kipling) v. Watts*, 4 Dowl. Rep. 290. 1 Har. & W. 525. 11 Leg. Obs. 86. S. C.

^f *Smith v. Muller*, 3 Durnf. & E. 624.

^g For the mode of entitling the declaration, previously to the late rules, see *Tidd Prac.* 9 Ed. 426.

^h *Ante*, 132, 3.

ⁱ R. M. 3 W. IV. reg. 15. 4 Barn. & Ad. 4. 9 Bing. 447. 1 Crompt. & M. 6.

Entry of, on record.

"every declaration shall in future be *entitled* in the proper court, and of the day of the month and year on which it is filed or delivered." And, by a subsequent rule^a, "every pleading, as well as the declaration, shall be entitled of the *day* of the month and year when the same was pleaded, and shall bear no other time or date; and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge." The former of these rules, however, does not apply to actions of *ejectment*^b; and they seem to be both confined to actions over which the courts of common law have a concurrent jurisdiction; and therefore, they do not extend to *real* actions, or *revenue* causes^c.

Venue.

It was formerly necessary that a certain *place* should be alleged in the declaration, where every material and traversable fact was supposed to have been done^d; which was called the *venue*: And, in actions by *original*, the venue, in the King's Bench, must formerly have been laid in the county where the writ was brought; and if it were not so laid, the court would have set aside the proceedings for irregularity, and the plaintiff would have lost his bail^e. But, in the Common Pleas, though the practice was formerly the same as in the King's Bench^f, a rule was made^g, that "where an arrest was by virtue of a *capias ad respondendum*, in any county, and bail was put in thereupon, and the plaintiff thought proper afterwards to declare in a different county, it should not be deemed a waiver of the bail; but the recognizance of bail should be as effectual, for the benefit of the plaintiff, and he might proceed thereon against the bail, in the same manner as if the plaintiff had declared against the defendant in the same county in which bail was put in." And now, by a general rule of all the courts^h, "a declaration laying the venue in a different county from that mentioned in the process, shall not be deemed a waiver of the bail."

^a R. Pl. Gen. H. 4 W. IV. reg. 1.

Obs. 475. S. C.

^b Barn. & Ad. Append. i. 10 Bing. 464. 2 Crompt. & M. 11.

^d Com. Dig. tit. *Pleader*, C. 20.

^e Yates v. Plaxton, 3 Lev. 235.

^b Doe d. Haines v. Roe, 2 Moore & S. 619. Doe d. Fry v. Roe, 3 Moore & S. 370. Doe d. Ashman v. Roe, 1 Bing. N. R. 253. 1 Scott, 166. S. C. Doe d. Evans v. Roe, 2 Ad. & E. 11.

^f Crutchfield v. Sewards, Barnes, 116.

^g R. H. 22 Geo. III. C. P.; and see Tidd Prac. 9 Ed. 294. 432.

^c Miller v. Miller, 1 Hodges, 31. 1 Scott, 387. 3 Dowl. Rep. 408. 9 Leg.

^h R. H. 2 W. IV. reg. 1. § 40. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

The venue, or place where the action is laid and intended to be tried, is inserted in the margin of the declaration; and it was formerly holden, that the county in the margin would help but not hurt^a: Hence, if there were no venue, or it were not laid with certainty^b, in the body of the declaration, reference must have been had to the margin; but where the proper venue was laid in the body, the county in the margin would not vitiate it^c. And now, by a general rule of all the courts^d, it is ordered, that "the name of a county shall in all cases be stated in the margin of a declaration; and shall be taken to be the venue intended by the plaintiff: and no venue shall be stated in the body of the declaration, or any subsequent pleading: Provided, that in cases where local description is now required, such local description shall be given." But, notwithstanding this rule, it is not a ground of special demurrer, that a venue is inserted in the body of the declaration^e: and if a venue be improperly stated therein, it is no ground for setting aside the declaration; but the proper course is to apply to a judge at chambers, to strike it out^f.

In margin.

Not to be stated, in body of declaration.

When local description is necessary.

In actions by *bill*, against common persons, in the King's Bench, the declaration formerly began by stating the defendant to be in custody of the marshal; or, if he were in custody of the sheriff, or bailiff or steward of a franchise, having the return and execution of writs, it should have alleged in whose custody he was, at the time of the declaration, by virtue of the process of the court, at the suit of the plaintiff. If the action were brought by or against particular persons, as *assignees*, *executors*, &c. the special character in which they sued, or were sued, should have been set forth in the beginning of the declaration: And in actions against *attornies*, instead of stating that they were in custody of the marshal or sheriff, it should have been stated that they were *present* in court; or, in actions against *peers*, or *members* of the House of Commons, that they had privilege of *peerage*, or of *parliament*^g.

Declaration, how formerly commenced, in actions by *bill*, in K. B.

^a 1 Wms. Saund. 5 Ed. 308. (1.)

^b Sutton v. Fenn, 2 Blac. Rep. 847.

3 Wils. 339. S. C.

^c Jodderell v. Cowell, Cas. temp. Hardw. 343, 4. Howse v. Hazelwood, Barnes, 483. Mellor v. Barber, 3 Durnf. & E. 387. Doe d. Goodwin v. Roe, 3 Dowl. Rep. 323. 9 Leg. Obs. 301. S. C. per Patteson, J.; and see Tidd Prac. 9 Ed. 294. 432.

^d R. Pl. Gen. H. 4 W. IV. reg. 6. 5 Barn. & Ad. Append. v. 10 Bing. 467.

^e 2 Crompt. & M. 16.

^f Harper v. Chumneys, 2 Dowl. Rep. 680. Farmer v. Champneys, 1 Crompt. M. & R. 369. 4 Tyr. Rep. 859. S. C. Neill v. Davis, 2 Dowl. Rep. 681. 1 Crompt. M. & R. 370. S. C. Fisher v. Snow, 3 Dowl. Rep. 27.

^g Townsend v. Gurney, 1 Crompt. M. & R. 590. 5 Tyr. Rep. 214. 3 Dowl. Rep. 168. 9 Leg. Obs. 110. S. C. per Gurney, B.

^h Tidd Prac. 9 Ed. 432, 3.

By *original*, in
K. B. or C. P.

As now regu-
lated by R. M.
3 W. IV. reg.
15.

By R. Pl. Gen.
Hil. 4 W. IV.
reg. 20.

In actions of *account, covenant, debt, annuity, detinue, and replevin*, where the *original* was a *summons*, the declaration by *original writ* in the King's Bench or Common Pleas, began by stating that the defendant was *summoned* to answer: in actions on the *case, trespass, ejectment, &c.* where the original was an *attachment*, it stated that he was *attached* to answer^a. In the Exchequer, the declaration formerly began, by stating that the plaintiff was a debtor to the king; or, if the action were brought by an *executor* or *administrator*, that he was a debtor to him, for the debts of the testator, or intestate; but since the uniformity of process act, this statement is unnecessary^b. The commencement of declarations, however, after *summons* or *arrest*, on the uniformity of process act, is now regulated by a general rule of all the courts^c, which prescribes the form to be used in commencing them; 1. after *summons*; 2. after *arrest*, where the party is not in custody; or 3. where he is in custody; and 4. after *arrest* of one defendant, where another has been served only. But this rule, we have seen^d, does not extend to actions commenced in inferior courts, and removed, by *habeas corpus*, into the King's Bench: Therefore, in such cases, the plaintiff may still declare against the defendant, in the old form, thus: "*A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our Lord the now King, before the King himself: For that, &c.*"^e So, the rule does not apply to actions of *ejectment*^f: And in general, the date of the writ need not be stated in the commencement of the *declaration*, although it must be inserted in the *issue*, according to the form given in the schedule to the pleading rules of *Hil. 4 W. IV.*^g. By one of these rules^h, it is ordered, that "in all cases under the law amendment actⁱ, in which, after a plea in abatement of the nonjoinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against

^a Com. Dig. tit. *Pleader*, C. 12. 2 Wms. Saund. 5 Ed. (1.); and see Tidd *Prac.* 9 Ed. 433. Append. thereto, Chap. XVII. § 7, &c. Chap. XLV. § 60. Chap. XLVI. § 20, &c.

^b *Hirst (or Hunt) v. Pitt*, 1 Crompt. & M. 324. 3 Tyr. Rep. 264. 1 Dowl. Rep. 659. S. C.

^c R. M. 3 W. IV. reg. 15. 4 Barn. & Ad. 4, 5. 9 Bing. 447, 8. 1 Crompt. & M. 341. And for the commencement of declarations, see 1 Chit. *Jur. Pl.* 1, &c.

^d *Ante*, 17, 18, 60, 200.

^e *Dod v. Grant*, 6 Nev. & M. 70.

^f *Doe d. Haines v. Roe*, 2 Moore & S. 619. *Doe d. Fry v. Roe*, 3 Moore & S. 370.; and see *Doe d. Gillett v. Roe*, 1 Crompt. M. & R. 19. 4 Tyr. Rep. 649. 2 Dowl. Rep. 690. S. C.

^g *Dupré v. Langridge*, 2 Dowl. Rep. 584. 8 Leg. Obs. 397. S. C. *per Patteson, J.*

^h R. Pl. Gen. H. 4 W. IV. reg. 20. 5 Barn. & Ad. Append. vii. 10 Bing. 469. 2 Crompt. & M. 19.

ⁱ 3 & 4 W. IV. c. 42. § 10.

the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the form prescribed by that rule;" which will be found in the *Appendix* to this work ^a.

The declaration should regularly correspond with the process, in the names of the *parties* to the action, the description of the *character* in which they sue or are sued, and the nature of the *cause* of action ^b. It was formerly necessary to repeat the names of the parties throughout the declaration ^c; but it was afterwards holden to be no objection to a declaration, that the parties, having been once called by their names, were afterwards designated by the terms plaintiff and defendant ^c; which is now, and has been for more than twenty years, the common mode of declaring: And where a writ was *general*, and the declaration *special* as *assignee*, this was holden to be no ground for setting them aside as irregular ^d. So, where the plaintiffs declared, in the commencement of their declaration, as *executors*, and then set forth a cause of action accruing to themselves, the court held it to be no ground of demurrer ^e. The same point was decided upon a declaration, where the plaintiff commenced it as *assignee* of the sheriff, and then set forth a bond to himself ^f. And in *debt* by assignees of an insolvent debtor, or bankrupt, it need not be stated that the plaintiffs sue "as assignees:" ^g it is enough, if it sufficiently appear that they are assignees ^g: and they may declare in the *debet* and *detinet* ^h.

Correspondence of, with process.

In names of parties.

Character in which they sue.

With regard to the nature of the *cause* of action, it has been holden, that where the writ of *summons* is to answer the plaintiff in an action of *trespass on the case*, and the declaration in *trespass*, the proceedings may be set aside for irregularity ^h. And where the writ is irregular, as being in *trespass*, and yet claiming a *debt*, and the defendant neglects to move to set it aside within the proper time, yet if it be followed by a declaration varying from the writ, as in *assumpsit*, the court will set aside

Cause of action.

^a Append. post, § 1.

^b For the correspondence of the declaration with the process, before the uniformity of process act, see Tidd *Prac.* 9 Ed. 446, &c.

^c Davison v. Savage, 6 Taunt. 121. 2 Marsh. 101. S. C. Stevenson v. Hunter, 6 Taunt. 406. 2 Marsh. 101. S. C.; and see Tidd *Prac.* 9 Ed. 433.

^d Knowles v. Johnson, 2 Dowl. Rep. 653.

^e Hargraves v. Holden, 1 Crompt. M. &

R. 580. (a.)

^f Reynolds v. Welsh, 1 Crompt. M. & R. 580. 5 Tyr. Rep. 202. 3 Dowl. Rep. 441. S. C.

^g Ferguson v. Mitchell, 2 Crompt. M. & R. 687. 1 Tyr. & G. 179. 1 Gale, 346. 4 Dowl. Rep. 513. S. C.

^h Anon. 1 Dowl. Rep. 687 (a.) and see King v. Skeffington, 1 Crompt. & M. 363. 3 Tyr. Rep. 318. 1 Dowl. Rep. 686. S. C. *Ante*, 68. 68.

both declaration and writ^a. But where the writ of *summons* was in an action on *promises*, and those words were omitted in the declaration, but which appeared a good declaration in *assumpsit*, the court held it not to be an irregularity^b: And the mis-statement of the form of action, at the commencement of the declaration, is an irregularity only, and not fatal, on special demurrer^c. Where the plaintiff arrests the defendant on a *capias*, in an action on *promises*, and declares in *covenant*, the court, though they will set aside the declaration, will not discharge the bail^d. It is no ground of demurrer to a declaration, that in setting out the process, it states the action to be in *case*, and then declares on *promises*^e. So, where the *summons* was in *debt*, and the declaration commenced in *debt*, and the rest of it only contained the common counts in *assumpsit*, it was holden that the declaration was not such a nullity, as the court would interfere to set aside on motion^f. So, in an action of *debt* by *executors*, it is no ground of demurrer, that the plaintiffs declare in the *debet* and *detinet*^g; nor is it any ground of general demurrer to a declaration in *scire facias* against bail, that the proceeding is stated therein to have been by *bill*, which is now abolished^h.

Form of declaring, on bills or notes, &c.

It having been found, that declarations in actions on bills of exchange, promissory notes, and the counts usually called the common counts, occasioned unnecessary expense to parties, by reason of their length, and that the same might be drawn in a more concise form; it was, for the prevention of such expense, ordered by a general rule of all the courtsⁱ, that "if any declaration in *assumpsit*, thereafter filed or delivered, being for any of the demands mentioned in the

^a *Edwards v. Dignam*, 2 Dowl. Rep. 240. 2 Crompt. & M. 346. 4 Tyr. Rep. 213. S. C.

^b *Straughan v. Buckle*, 1 Har. & W. 519.

^c *Marshall (or Anderson) v. Thomas*, 2 Dowl. Rep. 208. 9 Bing. 678. 3 Moore & S. 98. S. C.

^d *Ward v. Tummon*, 1 Ad. & E. 619. 4 Nev. & M. 876. S. C. *Ante*, 163.

^e *Wilson v. Prime*, 7 Leg. Obs. 11. *per Taunton, J.*; and see 2 Nev. & M. 834, 5. (b.) *Marshall (or Anderson) v. Thomas*, 2 Dowl. Rep. 208. 9 Bing. 678. 3 Moore & S. 98. S. C. *Lyng v. Sutton*, 4 Moore & S. 417. *Scrivener v. Watling, (or Watley)*, 1 Har. & W. 8. 9 Leg. Obs.

299. S. C.

^f *Rotton v. Jeffery*, 2 Dowl. Rep. 637. 9 Leg. Obs. 27. S. C.

^g *Collett v. Collett*, 3 Dowl. Rep. 211. 9 Leg. Obs. 252. S. C.

^h *Darling (or Darlington) v. Gurney*, 2 Dowl. Rep. 235. 2 Crompt. & M. 226. 4 Tyr. Rep. 2. 7 Leg. Obs. 302. S. C. Excheq.; but see *Darling v. Gurney*, 2 Dowl. Rep. 101. *Peacock v. Day*, 3 Dowl. Rep. 291. 9 Leg. Obs. 251, 2. S. C. *per Littledale, J. semb. contra.*

ⁱ R. T. 1 W. IV. reg. X. 2 Barn. & Ad. 783. 7 Bing. 774, 5. 1 Crompt. & J. 474, 5.; and see 2 Rep. C. L. Com. 42. 91. 95.

schedule of forms and directions annexed to that order ^a; or demands of a like nature, shall exceed in length such of the said forms, set forth or directed in the said schedule, as may be applicable to the case; or if any declaration in *debt*, to be so filed or delivered, for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff, if he succeed in the cause; and such costs of the excess as have been incurred by the defendant, shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff: And it was further ordered, that on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney, in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant, on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill."

In an action on an inland bill of exchange, against the acceptor, by the drawer, being also the payee, the form given by the schedule to the above rule ^b is, that the plaintiff on a certain day made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff, — *l.* — days (weeks or months) after the date (or sight) thereof, "which period has *now* elapsed:" And notwithstanding the uniformity of process act ^c, by which the mode of commencing personal actions is materially altered, it has been holden that a count on a bill of exchange, following the above form, is sufficient; though it would perhaps be more correct, either to state the date of the bill, or that the time for payment had elapsed before the commencement of the suit ^d.

Count on inland bill, against acceptor, by drawer, being also payee.

The *common* counts, given in the schedule to the above rule ^e, are that "the defendant, on —, at — ^f, was indebted to the plaintiff, in — *l.* for the price and value of goods, then and *there* ^f bargained

Common counts.

^a Append. to Tidd *Sup.* 1832, p. 107, &c. And for precedents of declarations, in *assumpsit* and *debt*, upon bills of exchange, and promissory notes, &c. and on the common counts, see Mr. *Hennell's* valuable collection of Forms, prepared in conformity with the above rule.

^b Sched. to R. T. 1 W. reg. X. 2 Barn. & Ad. 784. 7 Bing. 777. 1 Crompt. & J. 477.

^c 2 W. IV. c. 39.

^d 13 Leg. Obs. 111; but see *Aslett v. Abbott*, 1 Tyr. & G. 448. *Abbott v. As-*

lett, (or *Arlett*), 1 Meeson & W. 209. 4 Dowl. Rep. 759. 12 Leg. Obs. 287. S. C. *Pullen v. Seymour*, 5 Dowl. Rep. 164. 12 Leg. Obs. 292. S. C. *semb. contra*.

^e Sched. to R. T. 1 W. IV. reg. X. 2 Barn. & Ad. 787. 7 Bing. 781, 2. 1 Crompt. & J. 481, 2.

^f By a subsequent rule, however, (R. Pl. Gen. H. 4 W. IV. reg. 8.) it is ordered, that no venue shall be stated in the body of the declaration, or any subsequent pleading. *Ante*, 209.

and sold (*or* sold and delivered) by the plaintiff to the defendant, at his request: And in — *l.* for the price and value of work then and there done, and materials for the same provided, by the plaintiff for the defendant, at his request^a: And in — *l.* for money then and there lent by the plaintiff to the defendant, at his request: And in — *l.* for money then and there paid by the plaintiff, for the use of the defendant, at his request: And in — *l.* for money then and there received by the defendant, for the use of the plaintiff: And in — *l.* for money found to be due from the defendant to the plaintiff, on an account then and there stated between them: And whereas the defendant afterwards, on, &c. in consideration of the premises respectively, then and there promised to pay the said several monies respectively to the plaintiff, on request: yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof; to the plaintiff's damage, &c."

Decisions there-
on.

In an action of *assumpsit* for money lent, the day on which the defendant's promise is alleged to have been made, is immaterial^b. And a count for goods sold and delivered, stating that the defendant was on, &c. indebted to the plaintiff, in, &c. for goods sold and delivered by the plaintiff to the defendant, at his request, without any further allegation of time, has been holden good, on special demurrer^c: But a count, stating that the defendant was indebted to the plaintiff, on an account stated between them, is bad, on special demurrer, for want of an allegation of the time when the account was stated^d: it should be, "on an account *then* stated between them."^d Under a count for work and labour done, in an action of *debt*, the value of materials cannot be recovered^e. And where a declaration alleged the defendant to be indebted to the plaintiff, in a certain sum, for work and labour, without laying any promise to pay it, and then, under a 'whereas also,' proceeded to state him to be indebted to the plaintiff, in several other sums, for goods sold and delivered, &c. concluding that the defendant had promised to pay the said last mentioned several monies respectively to the plaintiff on request, the court held the declaration to be bad, on demurrer, for want of a promise in the first count, which was not referred to by the words "last mentioned" in the second

^a *Id. ib.*

^b *Arnold v. Arnold*, 3 Bing. N. R. 81.

^c *Lane v. Thelwell*, 1 Meeson & W. 140. 1 Tyr. & G. 352. 4 Dowl. Rep. 705. S. C.

^d *Ferguson v. Mitchell*, 2 Crompt. M. & R. 687. 1 Tyr. & G. 179. 4 Dowl.

Rep. 513. S. C. *Spyer (or Spire) v. Thelwell*, 2 Crompt. M. & R. 692. 1 Tyr. & G. 191. 4 Dowl. Rep. 509. 1 Gale, 348. S. C.

^e *Heath v. Freeland*, 1 Meeson & W. 543. 5 Dowl. Rep. 166. 12 Leg. Obs. 292. S. C.

count^a. If the declaration contain one or more counts against the maker of a note, or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then, in the general conclusion, to say "promised to pay the said *last mentioned several monies respectively*:"^b And therefore, where the first count of a declaration is against the defendant, as acceptor of a bill of exchange, stating a promise to pay the bill, without any breach, and is followed by a count for money lent, money paid, &c. with a promise to pay, limited to the latter sums, the breach is good, if it goes on to state that the defendant has disregarded his promises, and hath not paid the said monies^c.

In actions to which the above rule applies, if the debt amounts to *twenty pounds* and upwards, and the declaration is under *twenty-four folios*, the officer who taxes the costs is authorized, by instructions given by the courts to their taxing officers, in *Hilary term 1832*, to allow for declaration, including instructions, copy, and delivery, *1l. 18s.*; and for close copy, in *country* causes, according to length^d: Provided, that the above instructions shall not extend to cases in which several actions shall be brought on the same bill or note, against several parties thereto.

Costs allowed
for declaration.

In actions on policies of assurance, it is declared by a late statutory rule^e, that the interest of the assured may be averred thus: "That *A. B. C. & D.* or some or one of them, were or was interested," &c.; and it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested." By the statute 2 & 3 W. IV. c. 71. § 5. for shortening the time of *prescription* in certain cases, it is enacted, that "in all actions upon the *case*, and other pleadings, wherein the party claiming may now by *law* allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in that act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence, to sustain or rebut such allegation." And, by a late statutory rule^f, it is declared, that "in actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration, by name or abutments,

Averment of
interest, in ac-
tions on policies
of assurance.

Rights of com-
mon, &c. how
alleged by claim-
ant, in actions,
upon the case,
&c.

Description of
locus in quo, in
trespass *quare
clausum fregit*.

^a *Harding v. Hibel*, 4 Tyr. Rep. 814.

^e R. Pl. H. 4 W. IV. *Assumpsit*, reg.

^b Sched. to R. T. 1 W. IV. reg. X. 2
Barn. & Ad. 787. 7 Bing. 782. 1
Crompt. & J. 482.

I. § 4. 5 Barn. & Ad. Append. viii. 10
Bing. 470. 2 Crompt. & M. 21.

^c *Turner v. Denman*, 4 Tyr. Rep. 818.

^f R. Pl. H. 4 W. IV. *Trespass*, reg.

^d *Chapm. Bills of Costs*, 1832, p. 1. 12.

V. § 1. 5 Barn. & Ad. Append. ix. 10
Bing. 471. 2 Crompt. & M. 23.

or other description; in failure whereof, the defendant may demur specially."

When one count only, or several counts are allowed.

Several counts not allowed, unless for a distinct subject matter of complaint.

Instances of several counts prohibited, or allowed, by R. Pl. Gen. H. 4 W. IV. reg. 5.

The plaintiff was formerly allowed to insert as many counts in his declaration as he thought proper, subject to an application to the court or a judge, for striking out such as appeared on the face of them to be unnecessary or superfluous ^a, and to the risk of paying costs, on such as were found against him ^a. This practice being attended with great inconvenience ^b, a rule was made, in pursuance of the statute 3 & 4 W. IV. c. 42.^c, whereby, after reciting that by the mode of pleading thereafter prescribed, the several disputed facts material to the merits of the case, would, before the trial, be brought to the notice of the respective parties, more distinctly than theretofore, and by the said act of 3 & 4 W. IV. c. 42. § 23. the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, were greatly enlarged; it is ordered, that "several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each: Therefore, counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed: *Ex. gr.* Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for they are founded on the same subject matter of complaint, and are only variations in the statement of one and the same contract. So, counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed. So, counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed. But counts upon a bill of exchange or promissory note, and for the consideration in goods, money, or otherwise, are to be considered as founded on distinct subject matters of complaint; for the debt and the security are different contracts, and such counts are to be allowed. Two counts upon the same policy of insurance, are not to be allowed:

^a For the practice of the courts, as to striking out superfluous counts, previously to the above rule, see *Tidd Prac.* 9 Ed. 616, &c.; and as to the costs on several counts, when the plaintiff succeeded on one of them, see *id.* 971, 2. 974, 5.

^b For the inconvenience attending

this practice, and the reason for altering it, see 2 Rep. C. L. Com. 34, &c. 42, 8.

^c R. Pl. Gen. H. 4 W. IV. reg. 5. 5 Barn. & Ad. Append. ii., &c. 10 Bing. 464, &c. 2 Crompt. & M. 12, &c.

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed. Two counts on the same charter party, are not to be allowed: but a count for freight upon a charter party, and for freight *pro rata itineris*, upon a contract implied by law, are to be allowed. Counts upon a demise, and for use and occupation of the same land, for the same time, are not to be allowed."

In an action respecting tithes, the plaintiff introduced two counts into the declaration, one for the treble value of tithes not set out, the other for the same tithes bargained and sold; and the court conceiving this to be a violation of the rule, ordered the last count to be struck out, with costs; but bound the defendant to agree not to set up a composition at the trial, or that, if he did, the declaration might be amended ^a. So, where a declaration contained one count, claiming a fee or reward, in the name of metage, on coals imported into the port of *Truro*, alleged to be due to the plaintiff, as lessee under the corporation of *Truro*, of an ancient office of meter, to which the fee was stated to be incident, and another count, claiming the same sum as a port duty, the court held, that these counts were only different statements of the same subject matter of complaint, within the meaning of the above rule, and that one of them must be struck out ^b. But where the first count of a declaration was framed on the statute 11 Geo. II. c. 19. § 18. for the recovery of double rent, and the second count was for use and occupation, the court refused a rule to strike out one of the two counts ^c.

Decisions there-
on.

In actions of *tort* for misfeasance, it is declared by the above rule ^d, that "several counts for the same injury, varying the description of it, are not to be allowed: In the like actions, for nonfeasance, several counts founded on varied statements of the same duty, are not to be allowed. Several counts in *trespass*, for acts committed at the same time and place, are not to be allowed. Where several debts are alleged in *indebitatus assumpsit*, to be due in respect of several matters, *ex. gr.* for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained

When not allowed, in actions of *tort*, or *trespass*.

In *indebitatus assumpsit*.

^a *Lawrence v. Stephens*, (or *Stevens*), 3 Dowl. Rep. 777. 1 Gale, 164. 10 Leg. Obs. 348. 11 Leg. Obs. 225. S. C. *Sed quare*; and see *Thoroton (or Thornton) v. Whitehead*, 1 Meeson & W. 14. 1 Tyr. & G. 313. 1 Gale, 359. 4 Dowl. Rep. 747. 11 Leg. Obs. 214. 225. S. C. ^b *Jenkins v. Treloar*, 1 Meeson & W. 16. 1 Tyr. & G. 316. 1 Gale, 360.

⁴ Dowl. Rep. 690. S. C.

^c *Thoroton (or Thornton) v. Whitehead*, 1 Tyr. & G. 313. 1 Meeson & W. 14. 4 Dowl. Rep. 747. 1 Gale, 359. 11 Leg. Obs. 214. 225. 12 Leg. Obs. 157. S. C.

^d *R. Pl. Gen. H.* 4 W. IV. reg. 5. 5 Barn. & Ad. Append. iii. 10 Bing. 465. 2 Crompt. & M. 13.

On account
stated.

Several breaches
may be alleged
of same con-
tract.

Several counts,
for causes of
action arising
out of same
transaction.

Striking out un-
necessary or su-
perfluous counts,
before R. Pl.
Gen. H. 4 W.
IV. reg. 6.

and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count, within the meaning of the rule, which forbids the use of several counts, though one promise to pay only is alleged, in consideration of all the debts: Provided, that a count for money due on an account stated, may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject matter of complaint in respect of each of such counts. The rule, however, which forbids the use of several counts ^a, is not to be considered as precluding the plaintiff from alleging more breaches than one, of the same contract, in the same count." And although there has been but one transaction between the parties, yet there may have been several causes of action arising out of it, which may be made the subject of several counts: Thus, in an action on the *case* against the sheriff, one count may be inserted in the declaration, for not taking the defendant when he had an opportunity, and another, for suffering him to escape; for there might have been a time when the sheriff might have made the arrest, and had not done so, or he might have arrested the party, and afterwards permitted him to escape ^b.

Before the making of the above rule, where it appeared on the face of the declaration, that some of the counts were superfluous, the courts would have ordered them to be expunged; and if there were any vexation, would have made the plaintiff pay the costs of the application ^c. Thus, where several counts in a declaration were precisely the same, or, which more frequently happened, there was only a formal difference between them, and the same evidence would have supported each ^d, as if the plaintiff declared *generally* and *specialy* on a matter which might have been given in evidence upon a general count, the courts would have expunged the superfluous counts. So, if the declaration contained special counts for work and labour, beside the general counts, the special counts might have been struck out, on motion, if they appeared to be unnecessary ^e;

^a R. Pl. Gen. H. 4 W. IV. reg. 5. 5 Barn. & Ad. Append. iii. 10 Bing. 465. 2 Crompt. & M. 14.

^b Guest v. Everest, 9 Leg. Obs. 75. and see Tidd *Prac.* 9 Ed. 236.

^c Anon. *per Cur.* T. 56 Geo. III. K. B. 1 Chit. R. 449. (a). And for the use of several counts, and when formerly proper to insert them, see 1 Chit. Pl. 4 Ed. 350,

&c. Steph. Pl. 279, &c.

^d Wilkins v. Perry, Cas. temp. Hardw. 129. Bownas v. Wilcock, Barnes, 360. Nickleson v. Croft, 2 Bur. 1188. Yates v. Carlisle, 1 Blac. Rep. 270. Meeke v. Oxlade, 1 New Rep. C. P. 289. 1 Chit. Pl. 4 Ed. 351. Anon. 1 Chit. R. 449. (a.)

^e Anon. 1 Chit. R. 449. (a.) Gabell v.

and, in the King's Bench, where the plaintiff was an attorney, the rule was made absolute with costs: If there were any doubt, the court would have referred it to the master, to determine whether superfluous counts were introduced vexatiously^a. But where there was a material difference between the counts, the courts would not determine, upon affidavits, whether they were well founded in point of fact; for if not, it was considered the plaintiff would be sufficiently punished, by being deprived of costs on such of the counts as were found for the defendant^b: And, in one case, where there were counts in a declaration for work and labour as an attorney, and for work and labour generally, the court of Common Pleas refused to strike out the former counts as unnecessary^c.

By the above rule, however, "where more than one count shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts are founded on the same subject matter of complaint, for an order that all the counts, introduced in violation of the rule, be struck out, at the costs of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct subject matter of complaint is *bond fide* intended to be established, in respect of each of such counts; in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts mentioned in such application, which shall be allowed."^d On this rule, applications to strike out counts ought to be made to a judge at chambers, in the first instance; and if a doubt arise, the parties may come to the court^e. And where a declaration in *ejectment*, on the demise of the churchwardens and overseers of a parish, to recover parish property, contained two sets of counts, one specifying the names of the individuals, and the other not, the court ordered one set to be struck out^f. And though it seems, from the rule, that the application in general should be made to a judge

By that rule.

Shaw, 2 Chit. R. 299. 1 Dowl. & R. 171. S. C. Fraser v. Shaw, 7 Dowl. & R. 383. Jones v. Key, 2 Dowl. Rep. 265.

^a Newby v. Mason, 1 Dowl. & R. 508.

^b Turner and others, assignees, v. Kingston, H. 23 Geo. III. K. B. Hurd v. Cock, M. 36 Geo. III. K. B. Imp. K. B. 6 Ed. 754.

^c Brindley v. Dennett (or Bennett v. Brindley), 9 Moore, 358. 2 Bing. 184.

S. C.; and see Nelson v. Griffiths, 9 Moore 785. 2 Bing. 412. S. C. Tidd *Prac.* 9 Ed. 616, 17.

^d R. Pl. Gen. H. 4 W. IV. reg. 6. 5 Barn. & Ad. Append. iv. 10 Bing. 466. 2 Crompt. & M. 15.

^e Ward v. Graystock, 4 Dowl. Rep. 717.

^f Doe d. Llandesilio v. Roe, 4 Dowl. Rep. 222.

at chambers, yet the court held, that a motion for that purpose, involving a point of law, and the construction of an act of parliament, was properly brought before the full court^a. No objection, however, on the ground of superfluity of counts, can be taken on demurrer; but it must be made the subject of a motion^b.

Effect of inserting them, upon the trial.

Where there is more than one count upon the record, and the party pleading fails, upon the trial, to establish a distinct subject matter of complaint in respect of each count, it is declared by the above rule^c, that "a verdict and judgment shall pass against him upon each count, which he shall have so failed to establish; and he shall be liable to the other party, for all the costs occasioned by such count, including those of the evidence, as well as those of the pleadings:

As to costs, &c.

And further, in all cases in which an application to a judge has been made, under the preceding rule, and any count allowed as aforesaid, upon the ground that some distinct subject matter of complaint was *bond fide* intended to be established at the trial, in respect of each count so allowed, if the court or judge before whom the trial is had, shall be of opinion, that no such distinct subject matter of complaint was *bond fide* intended to be established, in respect of each count so allowed, and shall so certify before final judgment, such party so pleading, shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count with respect to which the judge shall so certify." The common counts given by the rule of *Trin.* 1 W. IV. reg. X. ^d, are considered as *separate* counts, within the meaning of the statutory rule of *Hil.* 4 W. IV. reg. 5. ^e, for the purposes of *pleading*, as well as of *costs* ^f.

Conclusion of declaration.

The declaration in general concludes, "to the *damage* of the plaintiff of a certain sum of money, and thereupon he brings suit, &c." But in a *penal* action, brought by a common informer, where the plaintiff's right to the penalty accrues upon bringing the action, it is not necessary to conclude in this way; as the plaintiff cannot have sustained any damage, by a previous detention of the penalty^g. In actions by *executors* or *administrators*, the declaration concludes, to their damage in that character, with the addition of a *profert in curia* of the letters testamentary, or of administration. And where a

^a Doe d. Llandesillo v. Roe, 4 Dowl. Rep. 222.

^b Gardner v. Bowman, 4 Tyr. Rep. 412.

^c R. Pl. Gen. H. 4 W. IV. reg. 7. 5 Barn. & Ad. Append. iv, v. 10 Bing. 466, 7. 2 Crompt. & M. 16.

^d *Ante*, 213, 14

^e *Ante*, 217, 18.

^f Jourdain v. Johnson, 2 Crompt. M. & R. 564. 5 Tyr. Rep. 524. 1 Gale, 312. 4 Dowl. Rep. 534. S. C.; and see Marshall v. Whiteside, 1 Meeson & W. 191, 2. 1 Tyr. & G. 491. 4 Dowl. Rep. 770. S. C.

^g Frederick v. Lookup, 4 Bur. 2021. Cuming v. Sibly, *id.* 2490; and see Tidd Prac. 9 Ed. 446.

declaration, by an administratrix, contained a *profert* of letters of administration, but did not positively allege that they were granted to her, nor by whom they were granted, the court held it to be bad, upon special demurrer^a. Before the uniformity of process act^b, a declaration, in the Exchequer, concluded by alleging that the plaintiff was less able to pay the debts he owed to the king^c; and a declaration in that court, omitting to conclude with such an allegation, was holden to be bad on special demurrer^d: But since the making of the above act, it is no longer necessary to state, in concluding a declaration in the Exchequer, that the plaintiff is less able to pay the debts owing to the king^e. It was anciently necessary to find *pledges* to prosecute, and add their names to the declaration by *bill*^f; but they were afterwards holden to be mere matter of form, and might have been found at any time before judgment^g: And, by a general rule of all the courts^h, "the entry of pledges to prosecute, at the conclusion of the declaration, shall in future be discontinued."

In Exchequer.

Pledges to prosecute discontinued.

Where the defendant has appeared on *serviceable* process, or put in and perfected special bail, on *bailable* process, a copy of the declaration should be *delivered* to his attorney *absolutely*, or to the defendant himself, if he has appeared in person, with an indorsement thereon, to plead within *four* days, if the venue be laid in *London* or *Middlesex*, and the defendant live within *twenty* miles of *London*; or, if he live above *twenty* miles from *London*, or the venue be laid in any other county than *London* or *Middlesex*, then the indorsement must be to plead within *eight* days after the delivery thereofⁱ. But where the defendant not having appeared, an appearance has been entered for him by the plaintiff, on *serviceable* process, or the defendant has not put in special bail on *bailable* process, a copy of the declaration must be *filed* with the clerk of the declarations in the King's Bench, or prothonotaries in the Common Pleas, or in the office of pleas in the Exchequer, and

Delivery of, or filing declaration, absolutely.

^a Hughes v. Williams, 1 Gale, 235. 2 Crompt. M. & R. 331. 4 Dowl. Rep. 160. 11 Leg. Obs. 31. S. C.; and see Higgs v. Warry, 6 Durnf. & E. 654. And for the conclusions of declarations, see 1 Chit. Jun. Pl. 9, &c.

^b 2 W. IV. c. 39.

^c Append. to Tidd Prac. 9 Ed. Chap. XVII. § 19, 20, 21.

^d Nickling v. Dickens, 2 Crompt. & J. 622.

^e Hirst (or Hunt) v. Pitt, 1 Crompt. &

M. 324. 3 Tyr. Rep. 264. 1 Dowl. Rep. 659. S. C.

^f 9 Edw. IV. 27. Bro. Abr. tit. *Bill*, 15. tit. *Pledges*, 11. Floteman v. Bygot, Dyer, 288.

^g Tidd Prac. 9 Ed. 446. and the authorities there referred to.

^h R. M. 3 W. IV. reg. 15. 4 Barn. & Ad. 5. 9 Bing. 448. 1 Crompt. & M. 7.

ⁱ Tidd Prac. 9 Ed. 451, 2; and see Chapm. K. B. 2 Addend. 105, 6. 110.

Notice of.

notice thereof delivered to, or left at the last or most usual place of abode of the defendant, if known; in which notice should be expressed the nature of the action, at whose suit it is prosecuted, and the time limited by the rules of court for pleading; and that in case the defendant do not plead by such limited time, judgment will be entered against him by default^a. It was formerly usual to state the amount of the damages in a notice of declaration, in the King's Bench^b; but this was not necessary in the Common Pleas^c: And now, by a general rule of all the courts^d, "it shall not be deemed necessary to express the amount of damages, in a notice of declaration."

Need not state amount of damages.

Sticking up in office.

In the Common Pleas, where the defendant's place of abode was unknown to the plaintiff, or his attorney, application must formerly have been made to the court, that affixing the declaration in the office, might be deemed good service^e; and it was not so considered, unless by express permission of the court, though the defendant's place of abode were unknown to the plaintiff^f. In a subsequent case, that court would not allow the affixing of a notice of declaration in the prothonotaries' office, to be good service; although it was sworn, that the defendant had no fixed place of residence, and that the plaintiff did not know where to find him^g: And, by a general rule of all the courts^h, "where the residence of a defendant is unknown, notice of declaration may be stuck up in the office, but not without previous leave of the court." The rule, in such case, on a proper *affidavit*ⁱ, is absolute in the first instance^k. But it must appear by the *affidavit*, that due diligence has been used to find the

^a Append. to Tidd *Prac.* 9 Ed. Chap. XVII. § 22; and see Tidd *Prac.* 9 Ed. 452. Chapm. K. B. 2 *Addend.* 106, 7.

^b Imp. K. B. 10 Ed. 186.

^c Hetherington v. Hobson, 6 Taunt. 331; and see Tidd *Prac.* 9 Ed. 457.

^d R. H. 2 W. IV. reg. I. § 41. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

^e Weller v. Robinson, 1 Taunt. 433.

^f Dirris v. Mackenzie, 5 Taunt. 777; and see Ward v. Neathercote, 7 Taunt. 145. 1 Chit. R. 675. (a.)

^g Kemp v. Powell, 8 Moore 273; and see Tidd *Prac.* 9 Ed. 457.

^h R. H. 2 W. IV. reg. I. § 49. 3 Barn. & Ad. 380. 8 Bing. 295. 2 Crompt. &

J. 181, 2.

ⁱ For the form of an *affidavit* to obtain leave to stick up a notice of declaration in the office, see Append. to Tidd *Sup.* 1833. p. 295.

^k Bridger v. Austin, 1 Moore & S. 520. 1 Dowl. Rep. 272. S. C. The *affidavit* in support of the motion in this case, stated the last known place of abode of the defendant, that he had not been there for two months past, and that the deponent, notwithstanding diligent endeavours, could not ascertain where his present residence was: and see Harding v. Rawlings, 11 Leg. Obs. 231. Sayer v. Powell, *id.* 260. per Patteson, J.

defendant^a; and, in order to render the service good, more than one attempt must be made to find him^a. If it be necessary to serve a declaration in a special manner, an application for that purpose must be made, previous to its being served out of the ordinary course^b. And where, on account of the defendant's residence being unknown, the court gives leave to serve the declaration in a particular manner, they will not make a prospective rule, that service of future rules, &c. may be effected in the same way^c.

Where the defendant has put in special bail, but the same are not perfected, if the plaintiff be dissatisfied therewith, he may deliver a copy of the declaration *de bene esse*^d, or conditionally, to the defendant's attorney, indorsed as follows: "delivered conditionally, until special bail be perfected; and the defendant must plead hereto in four (or eight) days." And there is a rule in the Exchequer of Pleas^e, that "all declarations *de bene esse* shall be filed with the sworn or side clerks^f, or their deputy, and shall be entered, in alphabetical order, in proper books for each term, to be kept by them for that purpose; which books shall, at all times within office hours, be open to the inspection of the persons admitted to practise as attorneys of that court, and their clerks, without fee or reward; and the declaration so filed shall and may be taken out of the office, by the defendant or his attorney, upon payment of the fees payable in respect thereof." Where a declaration is filed, it is deemed to be a good declaration only from the time of giving notice thereof: and therefore, where a declaration *de bene esse* was filed, and the defendant entered an appearance before notice was given of filing it, the declaration, and all subsequent proceedings, were set aside for irregularity^g.

Delivery of, or filing, *de bene esse*.

In Exchequer.

Good, if filed, from time of notice only.

^a Fry v. Rogers, 2 Dowl. Rep. 412. 7 Leg. Obs. 109. S. C. per Littleale, J. and see Heming (or Henning) v. Duke, 2 Dowl. Rep. 687. 9 Leg. Obs. 12. S. C. per Ld. Lyndhurst, Ch. B.

^b Troughton v. Craven, 3 Dowl. Rep. 436. 9 Leg. Obs. 172. S. C.

^c Martin v. Colvill, 2 Dowl. Rep. 694. per Alderson, B.; but see Broom v. Stittle, 1 Har. & W. 672.

^d Baisley v. Newbold, 4 Dowl. Rep. 177. 1 Gale, 245. 2 Crompt. M. & R. 325. 10 Leg. Obs. 478. S. C. Gosling v. Dukes, 4 Dowl. Rep. 178. Hodgson v. Mee, 5 Nev. & M. 302. 1 Har. & W. 398. S. C. Chapm. K. B. 2 Addend. 110; but see Rex v. Sheriff of Middlesex, in Ridgway v. Porter, 3 Dowl. Rep. 186.

And as to filing or delivering declarations *de bene esse*, see Tidd Prac. 9 Ed. 453, 4, 5.

^e R. M. 1 W. IV. reg. II. § 6. 1 Crompt. & J. 277. 1 Tyr. Rep. 159; and see R. M. 53 Geo. III. Man. Ex. Append. 226, 7. 8 Price, 508, 9. R. M. 1 W. IV. reg. II. § 11. 1 Crompt. & J. 279. 1 Tyr. Rep. 161, 2. Tidd Prac. 9 Ed. 454.

^f They are now filed with the *filazer*. Daz Ex. Pr. 2 Ed. 8.

^g Weddle v. Brazier, 1 Crompt. & M. 69. 3 Tyr. Rep. 237. 1 Dowl. Rep. 639. S. C. Rooke v. Sherwood, 4 Dowl. Rep. 363. 11 Leg. Obs. 453. S. C.; and see Tidd Prac. 9 Ed. 456.

Judgment of
non pros, for not
declaring.

If the plaintiff do not declare in due time, he is liable to be *non-prossed*, or have judgment signed against him, for not prosecuting his suit. This judgment is founded on the statute 13 *Car. II. stat. 2. c. 2. § 3*, by which it is enacted, that "upon an appearance entered for the defendant by attorney, in the term wherein the process is returnable, unless the plaintiff shall put into the court from whence the process issued, his bill or declaration against the defendant, in some *personal* action, or *ejectment* of farm, before the end of the term next following after appearance, a nonsuit, for want of a declaration, may be entered against him; and the defendant shall have judgment to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 *Hen. VIII.*"^a And as the appearance may now be entered in *vacation*, as well as in *term* time^b, it seems that, on *serviceable* process, when it is entered in *vacation*, the plaintiff must declare before the end of the next term after such appearance, or, on the writ of *capias*, before the end of the next term after the *eighth* day inclusive from the execution of the writ, otherwise a judgment of *non pros* may be signed.

When signed.

Decisions re-
specting.

Where a declaration in *replevin* was delivered in the name of a person as the attorney, but who in fact was not so, it was held, that the defendant could not treat the declaration as a nullity, and sign judgment of *non pros*^c. So, where it appeared that the defendant, on entering an appearance to the writ of *summons*, had made a mistake in the names of the parties, and notice being given to him of the fact by the plaintiff, he promised to amend, but instead of doing so, entered a new appearance, and then demanded a declaration, and the plaintiff not declaring within the following term, he signed judgment of *non pros*, the court, we have seen^d, was of opinion, that the defendant had been irregular in not amending the appearance, and therefore directed the judgment to be set aside^e. And where the tenant in a writ of *right*, not being able to discover who the demandant was, obtained a judge's order, directing the demandant's attorney to deliver to the tenant's attorney, within *four* days, the true name and address of his client, the court refused to allow the tenant to sign judgment of *non pros*, for disobedience of this order^f: The proper course, it seems, would be, to make the judge's order a rule of court, and then

^a c. 15

^b Stat. 2 W. IV. c. 39. § 2. and see *id.*
§ 11. *Ante*, 132, S. 135.

^c Bayley (or Bazley) v. Thompson, 2
Dowl. Rep. 655. 4 Tyr. Rep. 955. 2
Crompt. & M. 673. S. C.

^d *Ante*, 140.

^e Bate v. Bolton, (or Botten,) 4
Dowl. Rep. 160. 2 Crompt. M. & R.
365. 10 Leg. Obs. 478. S. C.; and see
Same v. Same, 1 Tyr. & G. 148. 4 Dowl.
Rep. 677. 12 Leg. Obs. 197. S. C.

^f Dumsday v. Hughes, 2 Scott, 377.

move for an attachment against the attorney^a. The *affidavit* in support of a motion to set aside a regular judgment of *non pros*, should state, either that there is a good cause of action on the merits, or that the debt is still due^b.

In the King's Bench, it was formerly the practice, that on all process issuing out of that court, returnable at a day certain, if the defendant appeared by his attorney, and filed bail of the term wherein the process was returnable, and the plaintiff did not declare before the end of the term next following, a judgment of *non pros* might have been signed, without entering any rule to declare, or calling for a declaration^c; which practice applied to actions by *original writ*^d in that court, as well as by *bill*. In the Common Pleas, however, the defendant must, before the end of the second term, or within *four days* after, have entered a rule for the plaintiff to declare^e, and demanded a declaration: But, by a general rule of all the courts^f, "it shall not be necessary for a defendant, in any case, to give a rule to declare, except upon removal from inferior courts:" though, by a previous rule^g, "no judgment of *non pros* shall be signed for want of a declaration, until *four days* next after a *demand*^h thereof shall have been made in writing, upon the plaintiff, his attorney or agent, as the case may be." A defendant, who deposits money with the sheriff in lieu of bail, is not in court, so as to demand a declaration, until the money is actually paid into court; though the sheriff has returned that he has paid in the money, and the plaintiff has consented to the defendant's entering a common appearance, and paying into court the additional ten pounds, under the 7 & 8 Geo. IV. c. 71. § 1ⁱ. It has also been determined, on the above rule, that a defendant need make only one demand of a declaration; and, after such demand, the plaintiff having obtained time to declare, the defendant will be entitled to sign judgment of *non pros*, at the expiration of the time allowed, without a fresh demand^k.

Rule to declare, and demand of declaration.

^a *Id.* (a.) *per Wilde*, Serjeant.

^b *Cortessos v. Hume*, 2 Dowl. Rep. 134.

^c R. M. 10 Geo. II. reg. II. (b.) K. B. Gilb. K. B. 345.

^d Imp. K. B. 10 Ed. 493. 531.

^e R. H. 9 Ann. Reg. III. C. P. Imp. C. P. 7 Ed. 194. 5. And as to the rule to declare, and demand of a declaration, see *Tidd Prac.* 9 Ed. 417, 18. 421, 2. 483.

^f R. H. 2 W. IV. reg. 1. § 38. 3

Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

^g R. T. 1 W. IV. reg. 4. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 471.

^h Append. to *Tidd Sup.* 1833. p. 296.

ⁱ *Hall v. Champneys*, 4 Dowl. Rep. 713. 1 Tyr. & G. 496. S. C.

^k *Teulon v. Gant*, (or Grant,) 5 Dowl. Rep. 153. 12 Leg. Obs. 245. S. C.

CHAP. XVIII.

Of IMPARLANCE, and TIME for PLEADING ; and of the NOTICE, and RULE to PLEAD, and DEMAND of a PLEA.

Impar-
lance,
what.

Different kinds
of.

In what cases
defendant must
formerly have
pleaded, without
imparlance.

IMPARLANCE is said to be, when the court gives a party leave to answer at another time, without the assent of the other party ^a; and, in this sense, it signified time to reply, rejoin, surrejoin, &c ^a. But the more common signification of imparlance was time to plead ^b: and it was either *general* ^c, without saving any exception to the defendant, which was always to another term ^d, or *special*, which was sometimes to another day in the same term ^e, with a saving of all exceptions to the writ, bill, or count; or, of all exceptions whatsoever: which latter was called a *general special* imparlance ^f.

Formerly, when the process, in the King's Bench, was returnable the last general return of the term ^g; or, in the Common Pleas, when it was returnable on that return, and the declaration was not filed or delivered on the return day, or on the day following ^h; or where the process, in either court, was returnable before, but the declaration was not delivered, or filed and notice thereof given, *four days exclusive* before the end of the term ⁱ, the defendant, if completely in court, was entitled to an imparlance; and must have pleaded within the first *four* days of the next term; provided the declaration were delivered, or filed and notice thereof given, before the essoin

^a Com. Dig. tit. *Pleader*, D. 1.

^b Anon. 2 Mod. 62. Anon. 2 Show. 310. Dowding v. Baker, Barnes, 345. 2 Wms. Saund. 5 Ed. 1. c. (2.)

^c Clapham v. Lenthall, Hardr. 365. Wentworth v. Squibb, 1 Lutw. 46. 12 Mod. 529. S. C. Gilb. C. P. 183. 211. 4 Bac. Abr. 27, 8. 3 Blac. Com. 301.

^d Longville v. Thistleworth, 6 Mod. 28.

^e Staple v. Haydon, *id.* 8. Case of University of Cambridge, 10 Mod. 127. Com. Dig. tit. *Pleader*, D. 1.

^f For an account of the different kinds

of imparlances, when and how granted, and what might or might not have been done after each of them, see 2 Wms. Saund. 5 Ed. 1. (2.) 1 Chit. Pl. 4 Ed. 375, &c. Grant v. Ld. Sondes, 2 Blac. Rep. 1094. Tidd *Prac.* 9 Ed. 462.

^g R. T. 5 & 6 Geo. II. (b.) R. M. 10 Geo. II. reg. 2. R. T. 22 Geo. III. K. B.

^h R. H. 35 Geo. III. C. P. 2 H. Blac. oct. ed. 551. 7 Taunt. 71. (a.) 2 Marsh. 337. (a.) 2 Chit. R. 381.

ⁱ R. T. 5 & 6 Geo. II. (b.) K. B.

day of that term; otherwise the defendant was allowed to imparl to the subsequent term^a. By a general rule, however, made by the judges of all the courts^b, in pursuance of the administration of justice act, (11 Geo. IV. & 1 W. IV. c. 70. § 11.) it was ordered, that "upon every declaration delivered or filed on or before the *last* day of any term, the defendant, whether in or out of any prison, should be compellable to plead as of such term, without being entitled to any imparlance." This rule only applied to cases where the writ, appearance, and declaration, were of the same term^c: and therefore, where the writ and appearance were of one term, and the declaration of another, the defendant was still entitled to an imparlance^c. And now, by the uniformity of process act^d, it is enacted, that "if any writ of *summons*, *capias*, or *detainer*, issued by authority of that act, shall be "served or executed on any day, whether in term or vacation, all "necessary proceedings to judgment and execution, may, except as "thereinafter provided^e, be had thereon, without delay, at the expiration of *eight* days from the service or execution thereof, on whatever day the last of such *eight* days may happen to fall, whether in "term or vacation." By this act, imparlances in *personal* actions are altogether abolished^f.

Abolished, by uniformity of process act.

There was formerly no imparlance roll in the King's Bench: But, in the Common Pleas, when an *original* was actually issued in the first instance, (which however was seldom the case,) or the proceedings were by *bill* filed against an attorney, or member of the House of Commons, if the defendant were entitled to an imparlance, it was formerly entered on a roll, called the *imparlance* roll, which was made up of the term the original writ was returnable, or bill filed; and contained an entry of the declaration or bill, and of the de-

Entry of imparlances.

^a Vidian's Introd. II. 2 Wms. Saund. 5 Ed. 1. c. (2.) and see Smith v. Haddon, 1 Leg. Obs. 158. *per* Littledale, J. Anon. 2 Leg. Obs. 78. *per* Patteson, J. Tidd Prac. 9 Ed. 466, 7.

^b R. T. 1 W. IV. reg. III. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 471; and see R. M. 1 W. IV. reg. II. § 11. 1 Crompt. & J. 279. 1 Tyr. Rep. 161.

^c Edensor v. Hoffman, 2 Crompt. & J. 140. 1 Price N. R. 175. 1 Dowl. Rep. 304. S. C. Thomson v. Smith, 1 Dowl. Rep. 381. *per* Taunton, J. Irving v. Williamson, E. 2 W. IV. K. B. *per*

Taunton, J. Whalley v. Bernet, 3 Tyr. Rep. 239. 1 Dowl. Rep. 607. S. C.

^d 2 W. IV. c. 39. § 11.

^e For these exceptions, *vide ante*, 132, 3.

^f Wigley v. Tomlins, 3 Dowl. Rep. 7. 9 Leg. Obs. 60. S. C. *per* Littledale, J. Nurse v. Geeting, 5 Tyr. Rep. 179. 1 Crompt. M. & R. 567. 3 Dowl. Rep. 157. 9 Leg. Obs. 159. S. C.; and see Sup. to Petersd. Pr. 20. Chapm. K. B. 2 Addend. 167. 1 Chit. Archb. Pr. 195; but see Frean v. Chaplin, 2 Dowl. Rep. 523. 8 Leg. Obs. 508, 9. S. C. *per* Taunton, J. Athert. Pr. 90. 110. *contra*.

Abolished.

fendant's appearance thereto, with the prayer and grant of an imparlance^a. But now, by a general rule of all the courts^b, "it shall not be necessary that imparlances should be entered on any distinct roll." And, by a subsequent rule of all the courts^c, "no entry of continuance by way of *imparlance*, shall be made upon any record or roll whatever: Provided, that such regulation shall not alter or affect any existing rules of practice, as to the times of proceeding in the cause."

Time for pleading, in general.

The time for pleading was formerly governed by the terms, and return days of the process, and the time when, and manner in which the declaration was delivered or filed, as whether it was delivered or filed absolutely, or *de bene esse*^d: but now, as the proceedings, by the uniformity of process act^e, may be carried on, except at certain times^f, in term or vacation, the declaration is in all cases delivered or filed; with notice to plead in *four* days after the filing or delivery thereof, if the action be laid in *London* or *Middlesex*^g, and the defendant live within *twenty* miles of *London*; and in *eight* days, if the action be laid in any other county^h, or the defendant live above *twenty* miles from *London*. And although imparlances, we have seenⁱ, are abolished by the uniformity of process act, yet the defendant is still entitled to *notice* to plead, before judgment can be signed for want of a plea^k.

When it does not expire before 10th August.

It should also be remembered, that in the uniformity of process act there is a *proviso*^l, that "no declaration, or pleading after declaration, shall be filed or delivered between the *tenth* day of *August*, and *twenty-fourth* day of *October*:" And, by a general rule of all the courts^m, "in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the *tenth* day of *August* in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the 24th day of *October*, as if the declaration, or preceding pleading, had been

^a Dyke v. Sweeting, 1 Wils. 183; and see Tidd Prac. 9 Ed. 720.

^b R. H. 2 W. IV. reg. I. § 109. 3 Barn. & Ad. 390. 8 Bing. 305. 2 Crompt. & J. 198.

^c R. Pl. Gen. H. 4 W. IV. reg. 2. 5 Barn. & Ad. Append. ii. 10. Bing. 464. 2 Crompt. & M. 11.

^d Tidd Prac. 9 Ed. 464, &c.

^e 2 W. IV. c. 39. § 11.

^f Ante, 132, 3.

^g R. T. 5 & 6 Geo. II. R. T. 22 Geo. III. K. B. R. T. 8 Geo. III. C. P. R. M.

1 W. IV. reg. II. § 11. 1 Crompt. & J. 279. 1 Tyr. Rep. 161. Excheq.; and see Tidd Prac. 9 Ed. 464, &c.

^h Holland v. Cooke, 1 Maule & S. 566.

ⁱ Ante, 227.

^k Fenton v. Anstice, 5 Dowl. Rep. 113. 12 Leg. Obs. 338, 9. S. C.; and see Tidd Prac. 9 Ed. 473, 4.

^l 2 W. IV. c. 39. § 11.

^m R. M. 3 W. IV. reg. 12. 4 Barn. & Ad. 4. 9 Bing. 446. 1 Crompt. & M. 5.

delivered or filed on the 24th day of *October*: but in such cases, it shall not be necessary to have a second rule to plead, reply, &c." On this rule, it has been holden, that if the time for pleading does not expire until after the 10th of *August*, although it may be enlarged time, the defendant has still the same time for pleading, as if the declaration had been filed or delivered on the 24th of *October*^a: And if a plaintiff before the 10th of *August*, give a greater number of days for pleading, than by the practice of the court is required, the defendant is entitled to avail himself, after the 24th of *October*, of that greater number^b.

After the delivery of a bill of particulars, except where an order has been obtained for further time, the defendant, in the King's Bench, had formerly the same time to plead, as he had when the summons for it was returnable^c: and, in the Common Pleas, the plaintiff could not have signed judgment, for want of a plea, till the expiration of *twenty-four* hours after the delivery of a bill of particulars; though the time for pleading were expired, and a demand of plea given, more than *twenty-four* hours before that time^d: And accordingly, by a general rule of all the courts^e, "a defendant shall be allowed the same time for pleading, after the delivery of particulars under a judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed, till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge." In the Exchequer, where the declaration was delivered on the 7th, to plead in *four* days, and on the 10th, an order for particulars was obtained, which were delivered on the 13th, the court held that judgment for want of a plea, signed at *one* o'clock on the *fifteenth*, was regular^f. And, in that court, a declaration in *assumpsit*, indorsed to plead in *four* days, having been delivered, with particulars of demand annexed, the plaintiff, *two* days afterwards, finding that the particulars were wrongly entitled, delivered a fresh particular properly entitled, and for want of a plea within the *four* days, signed judgment, the court held that the judgment was regular; the

After delivery
of bill of par-
ticulars.

^a *Wilson v. Bradslocke*, 2 Dowl. Rep. 416. 7 Leg. Obs. 76. S. C. *Trinder v. Smedley*, 3 Dowl. Rep. 97. 9 Leg. Obs. 223. S. C. per *Littledale, J.*

^b *Solomonson (or Salomonson) v. Parker*, 2 Dowl. Rep. 405. 7 Leg. Obs. 414. S. C. per *Littledale, J.*

^c *Mowbray v. Schubert*, 13 East, 506; and see *St. Hanlaire v. Byam*, 4 Barn. &

C. 970. 7 Dowl. & R. 468. S. C.

^d *Ramsay v. Ld. Reay*, 2 New Rep. C. P. 361; and see *Tidd Prac.* 9 Ed. 469. 598.

^e R. H. 2 W. IV. reg. I. § 48. 3 Barn. & Ad. 380. 8 Bing. 294, 5. 2 *Crompt. & J.* 181.

^f *Tate v. Bodfield*, 3 Dowl. Rep. 218.

accepting of the amended particular being a waiver of the objection to the first ^a.

Computation of time for pleading, and when the days are reckoned exclusively, or inclusively.

In computing the time for pleading, to declarations in the Common Pleas, the days were formerly reckoned *inclusively*; so that if a declaration were filed or delivered on the *first*, with notice to plead in *four* days, the plaintiff was entitled to sign judgment for want of a plea, on the opening of the office in the afternoon of the *fifth* day. But it should be observed, that by a general rule of all the courts ^b, "in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day; unless the *last* day shall happen to fall on a *Sunday*, *Christmas day*, *Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned *exclusively* of that day also." On this rule, where a declaration was delivered on the 4th of *August*, with notice to plead in *four* days, the court of Exchequer held, that judgment could not properly be signed till the afternoon of the *ninth*, for want of a plea ^c. In this court, the *afternoon*, for the purpose of signing judgment, does not commence, in term, till *three* o'clock ^d; and though, in *vacation*, the office is not open in the afternoon, yet it may be opened specially, for the purpose of signing judgment ^e.

Summons, and order, for further time to plead.

If the defendant be not prepared to plead, by the expiration of the time allowed him for that purpose, his attorney or agent should take out a *summons*, and obtain an order, for further time; which may be repeated, if necessary^f. And where the master of a ship was served with process in an action, on the eve of his departure on a foreign voyage, the judge, under particular circumstances, allowed twelve months' time to plead, which was afterwards sanctioned by the court ^g. But the court refused to grant an indefinite time to plead, on the ground that the defendant could not safely plead, till a rule pending in another court, and involving the same matter of defence, was determined; though they granted time to plead on or before a day fixed ^h.

^a Jones v. Fowler, 4 Dowl. Rep. 232. Rep. 201. 1 Gale, 269. 10 Leg. Obs. 1 Gale, 256. 11 Leg. Obs. 136. S. C. 381. S. C.

^b R. H. 2 W. IV. reg. VIII. 3 Barn. & Ad. 393. 8 Bing. 307, 8. 2 Cromp. & J. 201, 2; and see 3 Rep. C. L. Com. 44.

^c Kemp v. Fyson, 3 Dowl. Rep. 265.

^d Tate v. Bodfield, 3 Dowl. Rep. 218, 19; and see Leigh v. Bender, 4 Dowl.

^e Kemp v. Fyson, 3 Dowl. Rep. 265, 6. ^f Tidd Prac. 9 Ed. 469.

^g Hunt v. Barkley, (or Barclay,) 1 Hodges, 103. 3 Dowl. Rep. 646. S. C.

^h Clarke v. Allbutt, 1 Tyr. & G. 71. 1 Gale, 358. 4 Dowl. Rep. 684. 12 Leg. Obs. 191, 2. S. C.

In the King's Bench, the time allowed for pleading on a judge's order, is reckoned *exclusive* of the day of the date of the order ^a. And, in that court, where the order is for time to plead *till* a certain day, the word *till* is considered as *inclusive* of the day to which the time for pleading is enlarged ^b. In the Common Pleas, the time allowed is said to be *inclusive* of the date of the order, but *exclusive* of the day when it expires ^c: and, therefore, where an order for a *week* was dated the 16th of *May*, judgment signed for want of a plea on the 23d, was holden to be regular ^d. And, in the latter court, it seems that in general, when the time to plead is not expired at the time of making the order, the further time allowed is to be reckoned from the expiration of the time to plead, and not from the date of the order, or what is done under it ^e. But where the declaration was delivered on the 12th of *January*, with notice to plead in *four* days, and on the 13th, the defendant obtained a judge's order for "*seven days' time to plead*," upon an undertaking to accept short notice of trial for the last sitting in term, (the 26th,) the court held, that the seven days commenced from the date of the order, and not from the expiration of the *four* days ^f. In the Exchequer, where an order for *seven days' time to plead* was obtained on the 15th of *May*, and on the 22d, pleas were delivered, but irregular in several respects, and in the evening of that day, the plaintiff signed judgment as for a want of plea, the court set aside the judgment, as having been signed too early ^g. If there be an order for a *month's* time to plead, it is understood to mean a *lunar*, and not a *calendar* month ^h.

Further time,
how reckoned,
in K. B.

In C. P.

In Exchequer.

The rule to plead is the order of the court ⁱ; and might formerly have been entered, on a *præcipe* ^k, with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, or in the office of pleas in the Exchequer, at any time after the delivery, or filing and notice of the declaration, in *term* time; or, if the declaration were

Rule to plead,
what, and with
whom, when,
and how entered.

^a By the Master, (*Le Blanc*), on a reference from the court, on the last day of *Trinity* Term, 1827.

^b *Dakins v. Wagner*, 3 Dowl. Rep. 535. 9 Leg. Obs. 510. S. C. per *Patteson*, J.

^c *Kay v. Whitehead*, 2 H. Blac. 35.

^d *Read v. Montgomery*, E. 26 Gen. III. cited by *Gould*, J. in *Kay v. Whitehead*, 2 H. Blac. 35.

^e *Aspinall v. Smyth*, 2 Moore, 655. 8 Taunt. 592. S. C.

^f *Simpson v. Cooper*, 2 Scott, 840. 1

Hodges, 448. S. C.

^g *Pepperell v. Burrell*, 2 Dowl. Rep. 674. 1 Crompt. M. & R. 372. 4 Tyr. Rep. 811. S. C.; and see *Macher v. Billing*, *id.* 812. 1 Crompt. M. & R. 577. 3 Dowl. Rep. 246, S. C.

^h *Talbot v. Linfield*, 1 Blac. Rep. 450. 3 Bur. 1455. S. C. *Soper v. Curtis*, 2 Dowl. Rep. 237; and see *Tidd Prac.* 9 Ed. 470, 71.

ⁱ Append. to *Tidd Prac.* 9 Ed. 1471.

^k *Id. ib.*

delivered, or filed, and notice given *four* days exclusive before the end of the term, the rule to plead might have been entered, at any time during the first *four* days after term. The clerk of the rules, or secondaries, would indeed have accepted a rule to plead on the *essoins* day; but such rule could not have been entered, until the first day of term^a. And now, as the proceedings may be carried on, except in certain cases, in vacation, as well as in term time, the rule to plead may be entered at any time after the delivery, or filing and notice of declaration, whether in term or vacation. A rule to plead, however, must be given, before the plaintiff can regularly sign judgment for want of a plea: and where a defective plea had been delivered, and judgment afterwards signed as for want of a plea, the judgment was set aside as irregular, for want of a rule to plead^b: and a rule to plead being taken out in a wrong name, is a nullity^b. But where a writ issued, in *vacation*, and a declaration was delivered, and rule to plead given, in the same *vacation*, but the plaintiff did not sign judgment until the ensuing term, the court of Exchequer held, that it was not necessary to give a new rule to plead, in that term^c. So, where a declaration was delivered, and rule to plead given, in *Easter* term, and judgment was signed for want of a plea in *Trinity* term, the court held it to be regular, though a fresh rule to plead had not been given of that term^d.

When judgment may be signed, without giving new rule to plead.

New rule to plead unnecessary, after amending declaration.

In the King's Bench, if the plaintiff amended his declaration the same term, the defendant had formerly *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*^e; but if the amendment were made in a subsequent term, the defendant was entitled to a new *four*-day rule to plead^f. In the Common Pleas, it seems that a new *four*-day rule to plead was in all cases necessary to be given by the plaintiff, on amending his declaration^g: but a rule was afterwards made in that court^h, by which it was ordered, that "where any amendment in the declaration should be made after a rule to plead had been entered, no new rule to plead should be necessary, provided such amendment were made in the term, or the vacation succeeding the term, in or of which the rule

^a *Seller v. Faceby*, Cas. Pr. C. P. 68.

^b *Warne v. Beresford*, 4 Dowl. Rep. 361. 1 Tyr. & G. 230. 11 Leg. Obs. 437. S. C.; and see *Hough v. Bond*, 1 Meeson & W. 314. 1 Tyr. & G. 617. S. C.

^c *Mould v. Murphy*, 1 Cromp. & M. 495. 3 Tyr. Rep. 538. 2 Dowl. Rep. 54. S. C.

^d *Pryer v. Smith*, 1 Cromp. & M. 855. 3 Tyr. Rep. 820. 2 Dowl. Rep. 114. S. C.

and see *Usborne v. Peonell*, 1 Bing. N. R. 320. 1 Scott, 277. S. C.

^e *Powel v. Gay*, 1 Str. 705.; and see R. M. 10 Geo. II. reg. II. (b.) K. B.

^f *Barton v. Moore*, 8 Durnf. & E. 87.

^g *Blunt v. Morris*, 2 Blac. Rep. 785; and see *Tidd Prac.* 9 Ed. 469. 475. 708.

^h R. E. 1 W. IV. 5 Moore & P. 482. 7 Bing. 556.

to plead had been entered; and that the defendant should have *two* days, exclusive of the day on which the amendment was actually made, to alter his plea, or plead *de novo*, unless otherwise ordered by the court, or the judge, granting leave for the amendment." And, by a general rule of all the courts ^a, "where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term." In the Exchequer, where the plaintiff amends his declaration, with liberty for the defendant to plead *de novo*, if the defendant do not plead *de novo*, the former plea will stand, if it be applicable to the amended declaration ^b.

In the King's Bench, a demand of plea might formerly have been made at the time of delivering the declaration ^c, and indorsed thereon ^d: In the Common Pleas, a demand of plea must have been made after declaration delivered, and a rule to plead given; a demand of plea indorsed on the declaration ^e, or made before the rule to plead was given ^f, being deemed insufficient: But, by a general rule of all the courts ^g, "a demand of plea may be made at the time when the declaration is delivered, and may be indorsed thereon." Where a cause is removed from an inferior jurisdiction by *habeas corpus*, and the plaintiff declares conditionally before special bail perfected, and indorses a demand of plea on his declaration, according to the above rule, special bail is waived ^h.

Demand of plea, when and how made.

The plaintiff, in the King's Bench, could not formerly have signed judgment, for want of a plea, till the expiration of *twenty-four* hours after it had been demanded, whether the time for pleading were or were not expired when such demand was made ⁱ; and, in that court, if a plea were demanded on *Saturday*, the defendant had *twenty-four* hours to plead, after the demand, exclusive of *Sunday* ^k: but judgment might have been signed at any time after the *twenty-four* hours were expired, provided the time for pleading were then out; and

At what time judgment may be signed, after.

^a R. H. 2 W. IV. reg. I. § 42. 3 Barn. & Ad. 379. 8 Bing. 294. 2 Crompt. & J. 179, 80.

^b Fagg v. Borsley, 1 Crompt. & M. 770. 3 Tyr. Rep. 905. 2 Dowl. Rep. 107. 6 Leg. Obs. 478. S. C.

^c Churchwardens of Edmonton v. Osborne, 6 Durnf. & E. 689. Rundell v. Champneys, 1 Dowl. & R. 186.

^d Maxwell v. Skerrett, 5 East, 547.

^e Eames v. Jew, Barnes, 276.

^f Hewit v. Palmer, 4 Taunt. 51; and

see Tidd Prac. 9 Ed. 359. 476.

^g R. H. 2 W. IV. reg. I. § 43. 3 Barn. & Ad. 379. 8 Bing. 294. 2 Crompt. & J. 180.

^h Law v. Stevens, 1 Dowl. Rep. 425. 4 Leg. Obs. 266. S. C.

ⁱ Wooden v. Boynton, 1 Blac. Rep. 50. Dyche v. Burgoyne, 1 Durnf. & E. 454. Bowles v. Edwards, 4 Durnf. & E. 118.

^k Solomons v. Freeman, 4 Durnf. & E. 557.

therefore, if the plea had been demanded in the morning, the plaintiff was not obliged to wait until the opening of the office, in the afternoon of the following day ^a. In the Common Pleas, the rule was, that after a plea had been demanded, the defendant had in all cases till the opening of the office, in the afternoon of the following day, to plead; and if he did not plead within that time, the rule to plead being expired, the plaintiff might have signed judgment ^b: And accordingly, by a general rule of all the courts ^c, "judgment for want of a plea, after demand, may in all cases be signed at the opening of the office, in the afternoon of the day after that on which the demand was made, but not before." If a plaintiff treat a plea as a nullity, and sign judgment as for want of a plea, he so treats it for all purposes; and cannot afterwards say that it was merely irregular, so as to be a waiver of the demand of a plea ^d.

^a *Dyche v. Burgoyne*, 1 Durnf. & E. 454.

^c R. H. 2 W. IV. reg. I. § 66. 3 Barn. & Ad. 383. 8 Bing. 297. 2 Crompt. & J.

^b *Buckmaster v. Troughton*, Cas. Pr. C. P. 17, 18. *Broome v. Woodward*, *id.* 54; and see *Tidd Prac.* 9 Ed. 477.

186.
^d *Hough v. Bond*, 1 Meeßen & W. 314. 1 Tyr. & G. 617. S. C.

CHAP. XIX.

Of MOTIONS and RULES; and AFFIDAVITS in support of them; and the PRACTICE of the COURTS thereon, and by SUMMONS and ORDER, at a JUDGE'S CHAMBERS, &c.

HAVING treated in a former Chapter ^a, of the powers of the judges of the superior courts to make *general* rules, for the regulation of the proceedings therein, it is intended to treat, in the present Chapter, of *motions* and *rules* in *particular* cases, with the *affidavits* in support of them; and the practice of the courts thereon, and by *summons* and *order*, at a judge's chambers, &c.

A *motion* is an application to the court, by counsel, for a *rule* or order ^b; which is either granted or refused: and if granted, is either a rule *absolute* in the first instance, or only to shew cause, or, as it is commonly called, a rule *nisi*, that is, *unless* cause be shewn to the contrary; which is afterwards, on a subsequent motion, made absolute, modified, or discharged ^c. In the King's Bench, motions and rules are either on the *crown* side, or on the *plea* side of the court. In the Common Pleas, and Exchequer of Pleas, there is no *crown* side ^d: But in these latter courts, as well as in the court of King's Bench, a rule for an *attachment*, which is of a *criminal* nature, may be moved for, in cases of contempt^e, &c. Motions and rules on the *plea* side of the court of King's Bench, and in the Common Pleas and Exchequer, are *common* or *special*. Common rules are first, such as are given by the *master*, *filacer*, clerk of the *papers*, or clerk of the *errors*, in the King's Bench; or by the *prothonotaries*, *filacers*, or clerk of the *errors*,

How treated of.

Motion, what.

Rules absolute, or to shew cause.

In K. B.

In C. P. and Exchequer.

For attachment.

Common rules.

^a Chap. II. p. 27, &c.

^b The application to a court by counsel, is called a *motion*; and the order made by a court on any motion, when drawn into form by the officer, is called a *rule*. Wynne Eunom. Dial. II. §. 26. And for a general account of the practice of the courts on motions in *civil* suits, see *id.* § 25, &c.

^c As to *motions* and *rules* in general, and *affidavits* in support of them, &c. see Tidd *Prac.* 9 Ed. 478, &c.

^d *Hodgson v. Temple*, 5 Taunt. 503. 1 Marsh. 166. S. C.

^e For these cases, see Tidd *Prac.* 9 Ed. 478, 9.

in the Common Pleas; or by the clerk of the *rules* in the Exchequer: Secondly, such as are obtained as a matter of course, and *entered* with the clerk of the *rules*, in the King's Bench and Exchequer, or *secondaries* in the Common Pleas, on a *præcipe*, or note of instructions, made out by the attornies who apply for them; and are not founded on any motion in court, either real or supposed: Thirdly, such as were anciently moved for by the attornies at side bar, in the King's Bench and Exchequer; or, in the Common Pleas at side bar, on the *first* day of term, and in the *treasury* chamber, on other days; and are thence called *side bar*, or *treasury* rules^a: Fourthly, such as are drawn up by the clerk of the *rules* in the King's Bench and Exchequer, or *secondaries* in the Common Pleas, without being moved for in court, on producing a motion paper signed by counsel, or a serjeant, or a judge's or baron's order, &c.

Declared to be unnecessary.

Of the first two classes of common rules, some have been declared to be unnecessary, by general rules, made by all the judges, for rendering the practice uniform^b; as the rule for trial by *proviso*^c; the rule to *declare*, except upon removals from inferior courts^d; the rule to *plead*, after amending the declaration^e; the rule to *rejoin*^f, where the plaintiff took issue on the defendant's pleading, or traversed the same, or demurred, so that the defendant was not let in to allege any new matter^g; and the rule for judgment on the return of a writ of inquiry^h, or on a verdict, or nonsuitⁱ. Besides the rules which have been expressly declared to be unnecessary, some others have become *obsolete*, or been virtually abolished, in consequence of the alterations which have been made in the practice of the courts, by recent statutes and regulations. The rules which have become obsolete are, the rule for attornies, and officers of the court, to appear and plead to bills filed against them^b; or to take a bill against an attorney off the file^l; the rule for the increase, or sale of issues, on writs of *distringas*, in actions by *original*^k, or against persons having privilege of parliament^l; or for

Rules obsolete, or virtually abolished.

^a Sty. Pr. Reg. 375. Ed. 1707.

475. 708.

^b R. H. 2 W. IV. For these rules, see 3 Barn. & Ad. 374, &c. 8 Bing. 288, &c. 2 Crompt. & J. 167, &c.

^c R. H. 2 W. IV. reg. 1. § 108. 3 Barn. & Ad. 390. 8 Bing. 305. 2 Crompt. & J. 198; and see Tidd Prac. 9 Ed. 718.

^d R. H. 2 W. IV. reg. 1. § 71. 3 Barn. & Ad. 384. 8 Bing. 298. 2 Crompt. & J. 188; and see Tidd Prac. 9 Ed. 483. 761.

^e R. H. 2 W. IV. reg. 1. § 67. 3 Barn. & Ad. 383. 8 Bing. 297, 8. 2 Crompt. & J. 186.; and see Tidd Prac. 9 Ed. 463.

^f R. H. 2 W. IV. reg. 1. § 38. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179. and see Tidd Prac. 421, 2. 458. 921.

581. 903, 4. 3 Rep. C. L. Com. 43.

^h Tidd Prac. 9 Ed. 323. 483.

ⁱ Id. 484.

^g R. H. 2 W. IV. reg. 1. § 42. 3 Barn. & Ad. 379. 8 Bing. 294. 2 Crompt. & J. 179, 80; and see Tidd Prac. 9 Ed. 469.

^k Id. 110. 486, 7.

^l Id. 119.

a suggestion on the *Welch* judicature act, to entitle the defendant to a judgment of *nonsuit*^a. The rule to pay money into court, which was formerly drawn up on the signature of counsel^b, and afterwards converted into a side bar rule^c, is virtually abolished by the late pleading rules^d, except when required under the statute 3 & 4 W. IV. c. 42. § 21; and the rule to be present at taxing costs, which was formerly a side bar or treasury rule^e, is virtually abolished by a general rule of all the courts^f, in all cases, where notice of taxation is required by that rule, to be given to the opposite party.

It will next be proper to notice, the alterations which have been made as to *side bar*, and *treasury* rules. In the Common Pleas, if a warrant of attorney were above *one*, and under *ten* years old, leave to enter judgment thereon might have been formerly given, on a side bar or treasury rule^g: But now, by a general rule of all the courts^h, "leave to enter up judgment on a warrant of attorney, above *one* and under *ten* years old, must be obtained by a motion in term, or by order of a judge in vacation." The rule to *discontinue*, is a side bar or treasury rule, obtained from the clerk of the rules in the King's Benchⁱ and Exchequer, or secondaries in the Common Pleas^j; but in the latter court, if it were after plea pleaded, the defendant's attorney must formerly have consented to a rule in the treasury chamber in term time, or before a judge in *vacation*, or else there must have been a rule to shew cause. But, by a general rule of all the courts^k, "to entitle a plaintiff to discontinue, after plea pleaded, it shall not be necessary to obtain the defendant's consent: but the rule shall contain an undertaking, on the part of the plaintiff, to pay the costs, and a consent, that if they are not paid within *four* days after taxation, the defendant shall be at liberty to sign a *non pros*." The last day of term was not formerly considered to be a day for side bar rules, in the King's Bench; though it seems to have been otherwise in the Common Pleas: and, in the King's Bench, if the party were entitled to such a rule before, he might have taken it out on the last day of term, or in vacation,

Alterations, affecting side bar or treasury rules.

^a Tidd *Prac.* 9 Ed. 486. 969, 70.

^b *Id.* 621, 2.

^c R. H. 2 W. IV. reg. 1. § 55. 3 Barn. & Ad. 381. 8 Bing. 295. 2 Crompt. & J. 193.

^d R. Pl. Gen. H. 4 W. IV. reg. 18. 5 Barn. & Ad. Append. vi. 10 Bing. 468. 2 Crompt. & M. 18, 19.

^e Tidd *Prac.* 9 Ed. 484. 969, 90.

^f R. T. 1 W. IV. reg. VIII. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J.

472.

^g Tidd *Prac.* 9 Ed. 484, 485, 6. (y.)

553.

^h R. H. 2 W. IV. reg. I. § 78. 3 Barn. & Ad. 384. 8 Bing. 299. 2 Crompt. & J. 188.

ⁱ Tidd *Prac.* 9 Ed. 484. 680.

^j R. H. 2 W. IV. reg. 1. § 106. 3 Barn. & Ad. 390. 8 Bing. 304. 2 Crompt. & J. 198; and see 3 Rep. C. L. Com. 41.

dated as of the last day but one of the term^a: But, by a general rule of all the courts^b, "side bar rules may be obtained on the last, as well as on other days in term."

Rules formerly
obtained on sig-
nature of coun-
sel.

Considerable alterations have also been made as to several rules, which were formerly drawn up on the signature of counsel in the King's Bench, or of a serjeant in the Common Pleas, and which are now for the most part abolished, or become obsolete. The rule for the plaintiff to declare *peremptorily*, after several rules for time to declare, was formerly drawn up on a motion paper signed by counsel in the King's Bench^c, and was a rule to shew cause in the Common Pleas^d; but this rule may now be absolute in the first instance^e. The rule for a *good jury*, on the execution of a writ of *inquiry* before the chief justice, or a judge of assize, was formerly drawn up by the clerk of the rules in the King's Bench, on a motion paper signed by counsel^f; but by a general rule of all the courts^g, "there shall be no rule for a sheriff to return a *good jury*, upon a writ of inquiry; but an order shall be made by a judge upon summons, for that purpose." The rule to plead *several* matters, which will be more fully treated of in a subsequent chapter^h, was formerly a mere motion of course, which only required counsel's signature, in the King's Bench; but in the Common Pleas, it was a rule to shew cause, except in certain cases: But now, by a general rule of all the courtsⁱ "no rule to shew cause, or motion shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but such rules shall, except in certain cases, be drawn up, on a judge's order^k, to be made upon a summons^l, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances^m. The rule for a *concilium* on demurrer, special verdict, or writ of error, was formerly drawn up on the signature of counsel in the King's Benchⁿ, or of a *serjeant* in the Common Pleas^o; but is now rendered unnecessary, by a general rule of all the courts^p, which declares that "no motion or rule for a

^a Tidd *Prac.* 9 Ed. 498.

^b R. H. 2 W. IV. *reg.* I. § 96. 3 Barn. & Ad. 388, 9. 8 Bing. 303. 2 Crompt. & J. 196.

^c Tidd *Prac.* 9 Ed. 424.

^d *Id.* 487. *Post*, 239.

^e R. H. 2 W. IV. *reg.* I. § 39. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

^f Tidd *Prac.* 9 Ed. 576.

^g R. H. 2 W. IV. *reg.* I. § 101. 3 Barn. & Ad. 389. 8 Bing. 304. 2 Crompt. & J. 197.; and see *Price v. Williams*, 5 Dowl.

Rep. 160. 12 Leg. Obs. 214. S. C.

^h Chap. XXVII.

ⁱ R. T. 1 W. IV. *reg.* IX. 2 Barn. & Ad. 789. 7 Bing. 784, 5. 1 Crompt. & J. 472.

^k Append. to Tidd *Sup.* 1832. p. 114.

^l *Id.* *ib.*

^m *Id.* *ib.*

ⁿ Tidd *Prac.* 9 Ed. 484, 5. 737.

^o *Id.* 484, 5. 738.

^p R. Pr. H. 4 W. IV. *reg.* 6. 5 Barn. & Ad. Append. xiv. 10 Bing. 453. 2 Crompt. & M. 2.; and see 3 Rep. C. L. Com. 41.

concilium shall be required." The rule for a *view*, which required only counsel's signature in the King's Bench ^a, and in the Common Pleas was never granted without an *affidavit*, in any case, except in actions of *waste* ^a, may now, by a general rule of all the courts ^b, "in all cases, be drawn up, by the officer of the court, on the application of the party, without *affidavit*, or *motion* for that purpose."

All rules moved in court, are denominated *special* rules: and they Special rules. are either *absolute* in the first instance, or only *nisi*, to shew cause ^c. In the Common Pleas, some special rules, which were formerly rules *nisi*, are now absolute in the first instance; as the rule for the plaintiff to declare peremptorily, after several rules for time to declare ^d; for the defendant to change the venue ^e; for copyhold tenants of a manor to inspect and take copies of court rolls ^f, &c.; or for the discharge of debtors in execution for small debts, on the statute 48 Geo. III. c. 123^g. Considerable alterations have also been made respecting other special rules, by the general rules promulgated by all the judges, in pursuance of the administration of justice act ^h, for rendering the practice uniform ⁱ: Thus, the rule for costs for not proceeding to trial according to notice, is in general absolute in the first instance ^k: but there being a difference in the practice of the courts, as to the priority of motion for such costs, and for judgment as in case of a nonsuit, it is now settled, by a general rule of all the courts ^l, that "no motion for judgment as in case of a nonsuit shall be allowed, after a motion for costs for not proceeding to trial, for the same default; but such costs may be moved for separately, (*i. e.*) without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of: or the court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs for not proceeding to trial; but the payment of such costs shall not be made a condition of discharging the rule." There being also differences in the practice of the courts, as to the motion for leave to enter up judgment on an *old* warrant of attorney, or for a *scire facias* to revive a judgment more than *ten* years

^a Tidd *Prac.* 9 Ed. 485. 797.

^e Tidd *Prac.* 9 Ed. 388. 489. *Ante*,

^b R. H. 2 W. IV. *reg.* I. § 63. 3 194.
Barn. & Ad. 382. 8 Bing. 297. 2 Crompt.
& J. 185.

^a 11 Geo. IV. & 1 W. IV. c. 70. § 11.

ⁱ R. H. 2 W. IV. 3 Barn. & Ad. 374,
&c. 8 Bing. 288, &c. 2 Crompt. & J.
167, &c.

^c Tidd *Prac.* 9 Ed. 485.

^d *Id.* 424. 487, 8. Chap. XVII. *Ante*,
238.

^k Append. to Tidd *Prac.* 9 Ed. Ch.
XXXIII. § 12.

^e Tidd *Prac.* 9 Ed. 486. 488. 608, &c.
Post, Chap. XXIV.

^l R. H. 2 W. IV. *reg.* I. § 69. 3 Barn.

^f Tidd *Prac.* 9 Ed. 485, 6. 486 (*a.*)
487, 8. 594, *b.* *Post*, Chap. XXIII.

& Ad. 383. 8 Bing. 298. 2 Crompt. & J.
187.

old, a general rule was made, in the former case ^a, that "leave to enter up judgment on a warrant of attorney, above *one* and under *ten* years old, must be obtained by a motion in term, or by order of a judge in vacation; and if *ten* years old or more, upon a rule to shew cause;" and, in the latter case ^b, that "a *scire facias* to revive a judgment more than *ten* years old, shall not be allowed, without a motion for that purpose in term, or a judge's order in vacation; nor, if more than *fifteen*, without a rule to shew cause."

Additional rules. Some *additional* rules have been also introduced, by recent statutes, and general rules made by all the judges, in pursuance of the powers given them by the administration of justice act, &c. which may be moved for either in full court, or before a single judge: as the rule for a *mandamus* to examine witnesses residing abroad ^c, or for the examination of witnesses, upon interrogatories or otherwise, within the jurisdiction of the courts at *Westminster*, *Lancaster*, and *Durham* ^d, or a commission for that purpose out of such jurisdiction ^e, by the statute 1 W. IV. c. 22; for the trial of adverse claims ^f, or relief of sheriffs and other officers, in execution of process against goods and chattels ^g, by the *interpleader* act; for issuing a writ of *distringas* to compel the defendant to appear, in case he cannot be personally served with a writ of *summons* ^h, or for authorizing the plaintiff to enter an appearance for him, when the *distringas* cannot be executed ⁱ, for discharging defendant, on declaration of attorney whose name is indorsed on writ, that it was not issued by his authority ^j, or for the return of writs ^k, by the court in term time, or judge in vacation, by the uniformity of process act; and for the payment of money into court in certain actions ^l, for the trial of issues before the sheriff ^m, &c. or of local actions in any county ⁿ, or for revoking the power of arbitrator or umpire ^o, and compelling the attendance of witnesses, and production of any documents, before arbitrators ^p, by the law amendment act. In the Exchequer of Pleas, we have seen ^q, there was formerly no rule for time to declare; but the mode of obtaining it, was by *summons*

^a R. H. 2 W. IV. reg. I. § 73. 3 Barn. 138.

& Ad. 384. 8 Bing. 299. 2 Crompt. & J. 188. *Ante*, 237.

^b *Id.* § 79. 3 Barn. & Ad. 385. 8 Bing. 300. 2 Crompt. & J. 190.

^c Stat. 1 W. IV. c. 22. § 1.; and see stat. 13 Geo. III. c. 63. § 44.

^d Stat. 1 W. IV. c. 22. § 4, &c.

^e Stat. 1 & 2 W. IV. c. 58. § 1, &c.

^f *Id.* § 6. *Post*, Chap. XLI.

^g Stat. 2 W. IV. c. 39. § 3. *Ante*, 77.

^h *Id.* § 17. *Ante*, 98, 9.

ⁱ *Id.* § 15. *Ante*, 168, 9.

^j Stat. 3 & 4 W. IV. c. 42. § 21.

^k *Id.* § 17. *Post*, Chap. XXXIII.

^l *Id.* § 22. *Post*, Chap. XXIV. XXXIII.

^m *Id.* § 39. *Post*, Chap. XXXVI.

ⁿ *Id.* § 40. *Post*, Chap. XXXVI.

^o *Ante*, 205.

and order of a baron^a, and the time given was in the discretion of the baron making the order, regulated by the cause of action, and circumstances of the case^b: But, by a general rule of all the courts^c, "the plaintiff may have a rule for time to declare in the court of Exchequer, as well as in the other courts." If a pauper give notice of trial, and do not proceed, or be otherwise guilty of improper conduct, the court will order him to be dispaupered^d; and until this were done, they would not formerly have made any rule about costs^e: But, by a general rule of all the courts^f, "where a pauper omits to proceed to trial, pursuant to notice, or an undertaking, he may be called upon, by a rule to shew cause^g, why he should not pay costs, though he has not been dispaupered."

A *motion*, or application to the court, is sometimes preceded by a notice^h; and is in general accompanied with an *affidavit*, or *affidavits* of the facts necessary to support itⁱ. In the King's Bench, notice of motion is necessary in the case of an information, or to quash a conviction^k: And in other cases, it is frequently given, in order that the rule *nisi* may operate as a stay of proceedings^l; or to save time and expense, by affording the adverse party an opportunity of shewing cause in the first instance, or by inducing the court to disallow the costs of proceedings had after notice, and before the motion^m. In the King's Bench, however, a rule *nisi* for setting aside proceedings for irregularity, may be drawn up with a stay of proceedings, although notice of motion has not been givenⁿ: but a rule, under the first section of the interpleader act, cannot, it seems, be so drawn up, unless previous notice has been given^o. In the Exchequer, no-

Notice of motion.

^a Dax Pr. 1 Ed. 54.

^b Price Pr. 216.

^c R. H. 2 W. IV. reg. I. § 98. 3 Barn. & Ad. 379. 8 Bing. 293. 2 Crompt. & J. 179.

^d Tidd Prac. 9 Ed. 98. (h.)

^e *Id.* (i.); and see *id.* 98. 759.

^f R. H. 2 W. IV. reg. I. § 110. 3 Barn. & Ad. 390. 8 Bing. 305. 2 Crompt. & J. 199.

^g Doe d. Lindsey v. Edwards, 2 Dowl. Rep. 468.

^h Append. to Tidd Prac. 9 Ed. Chap. XIX. § 1, 2, 3, 4. 8. Chap. XXI. § 3.

ⁱ *Id.* Chap. XXI. § 5.

^k Rex v. Johnson, M. 22 Geo. III. K. B.

^l Fortescue v. Jones, 1 Dowl. Rep. 524. 5 Leg. Obs. 429. S. C. per Parke, J. Smith v. Wheeler, 3 Dowl. Rep. 431. 1 Gale, 15. 9 Leg. Obs. 318. S. C.

^m Tidd Prac. 9 Ed. 491.

ⁿ Stratton v. Regan, 2 Dowl. Rep. 585. 8 Leg. Obs. 397. S. C. per Patteson, J. but see Fortescue v. Jones, 1 Dowl. Rep. 524. 5 Leg. Obs. 429. S. C. per Parke, J. contra.

^o Smith v. Wheeler, 3 Dowl. Rep. 431. 1 Gale, 15. 9 Leg. Obs. 318. S. C. per Parke, B.

tice of motion to stay proceedings, is a *two days'* notice^a. The statute 14 Geo. II. c. 17. § 1. requires *notice* of motion, for judgment as in case of a nonsuit: In the King's Bench, the rule to shew cause was formerly considered a sufficient notice of itself^b; though it was otherwise in the Common Pleas^c: And now, by a general rule of all the courts^d, "a rule *nisi* for judgment as in case of a nonsuit may be obtained on motion, without previous notice; but in that case, it shall not operate as a stay of proceedings."

Affidavit in support of motion, before whom sworn.

Commissions for taking affidavits, in *England* and *Wales*, &c.

In *Great Britain*, by courts in *Ireland*.

The *affidavit* of the facts necessary to support a motion, or shew cause against it, may be sworn before the court or a judge; or before a commissioner authorized to take *affidavits*, by virtue of the statute 29 Car. II. c. 5.^e By that statute, (extended to the Isle of *Man*, by the statute 6 Geo. III. c. 50. § 2.) "the justices of the courts of "King's Bench and Common Pleas, and the Lord Treasurer, Chancellor and Barons of the Exchequer, are authorized, by *commission*, "to empower as many persons as they shall think fit and necessary, "in the several shires and counties within the kingdom of *England*, "and dominion of *Wales*, and town of *Berwick* upon *Tweed*, to take "and receive all and every such *affidavit* and *affidavits*, as any person "or persons shall be willing and desirous to make before any of the "persons so empowered, in or concerning any cause, matter, or "thing depending, or any wise concerning any of the proceedings "in the said respective courts, as masters extraordinary in chancery "used to do." And, by a subsequent statute^f, the courts of law and equity in *Ireland*, are empowered to grant commissions for taking *affidavits*, in all parts of *Great Britain*^g. But a commission to take *affidavits* does not authorize the commissioner to administer an oath, for the *vivâ voce* examination of a witness before an arbitrator^h. And where it appeared from the affidavits, that the defendant had been arrested for the amount of a bill of exchange, upon an affidavit made at *Athlone*, county of *Roscommon*, in *Ireland*, purporting to be sworn before a commissioner for taking affidavits for the court of Common Pleas, in the said county, and was signed "*John Gaynor*," who stated that he was not a commissioner for taking affidavits in the courts of *England*, but of *Ireland*, the court, having referred to

^a *Hannah v. Wyman*, 3 Dowl. Rep. & J. 187.

673.

^b *Anon. Loft*, 265.

^c *Gooch v. Pearson*, 1 H. Blac. 527.; and see *Chessell v. Parkin*, 2 Taunt. 46. *Tidd Prac.* 9 Ed. 491. 765, 6.

^d R. H. 2 W. IV. reg. I. § 68. 3 Barn. & Ad. 383. 8 Bing. 298. 2 Crompt.

^e § 2.; and see *Tidd Prac.* 9 Ed. 491.

And for the form of the *jurat* in these cases, see *Append. thereto*, Chap. XIX. § 6, &c.

^f 55 Geo. III. c. 175.

^g *Tidd Prac.* 9 Ed. 179. (o.)

^h *Rex v. Hanks*, 3 Car. & P. 419. *per Gaselee, J.*

the Chief Justice's clerk's list of commissioners, wherein Mr. *Gaynor's* name was not found, discharged the defendant out of custody, on entering a common appearance ^a. But where an affidavit of debt was sworn in *Ireland*, before a commissioner of the Common Pleas and Exchequer, it was holden, that the title of the court need not be prefixed to the affidavit when sworn; but that the affidavit might be taken before such commissioner, to be afterwards entitled and used in either court ^b. The commission for taking *affidavits* in *England* should, by the general stamp act ^c, be stamped with a *ten* shilling stamp. And, by the statute 11 Geo. IV. & 1 W. IV. c. 43. § 4, "all commissions for taking *affidavits*, to be made use of and "read in any court, shall, notwithstanding any demise of the crown, "remain and continue in force, during the pleasure of the succeeding sovereign, until the same shall be revoked, or otherwise "avoided."

Stamp duty on.

Not determined by demise of crown.

By the statute 11 Geo. IV. & 1 W. IV. c. 70. for the more effectual administration of justice in *England* and *Wales* ^d, "any person "who shall have been duly appointed a commissioner for taking "*affidavits*, in any of the courts abolished by that act, shall, upon "producing his appointment before the proper officer, and upon "payment of *one shilling*, be entitled to have his name inserted in a "list to be kept for that purpose, of such commissioners; and to "exercise, within the limits of his existing commission, the same "power and authority, and for the same purposes, as if his commission had issued from one of his majesty's courts at *Westminster*." And, by the late act for the further amendment of the law ^e, &c. reciting that it would be convenient if the power of the superior courts of common law and equity at *Westminster*, to grant commissions for taking *affidavits*, to be used in the said courts respectively, were extended; it is enacted, that "the Lord High-Chancellor, "Lord Keeper, or Lords Commissioners of the Great Seal, the said "courts of law, and the several judges of the same, shall have such "and the same powers for granting commissions, for taking and receiving *affidavits* in *Scotland* and *Ireland*, to be used and read in the "said courts respectively, as they now have, in all and every the "shires and counties within the kingdom of *England*, and dominion

Authority of commissioners, in courts abolished by administration of justice act.

Power of granting commissions extended to *Scotland*, and *Ireland*.

^a *Sharpe v. Johnson*, 4 Dowl. Rep. 324.
² Bing. N. R. 246. ² Scott, 405. 1
Hodges, 298. 11 Leg. Obs. 117, 18. S. C.
 and see *Wrangen v. Frowd*, 11 Leg. Obs.
 261.

^b *Perse v. Browning*, 1 Meeson & W.

362.

^c Stat. 55 Geo. III. c. 184. Sched.
 Part II. § 3.

^d § 18. and see stat. 5 Geo. IV. c. 106.
Tidd Prac. 9 Ed. 491. (L.)

^e 3 & 4 W. IV. c. 42. § 42.

" of *Wales*, and town of *Berwick upon Tweed*, and in the isle of *Man*,
 " by virtue of the statutes now in force ; and that all and every
 " person and persons, wilfully swearing or affirming falsely, in any
 " *affidavit* to be made before any person or persons who shall be
 " so empowered to take *affidavits* under the authority aforesaid,
 " shall be deemed guilty of perjury, and shall incur and be liable to
 " the same pains and penalties, as if such person had wilfully sworn
 " or affirmed falsely, in the open court in which such *affidavit* shall
 " be entitled, and be liable to be prosecuted for such perjury, in any
 " court of competent jurisdiction, in that part of the united kingdom
 " in which such offence shall have been committed, or in that part of
 " the united kingdom in which such person shall be apprehended on
 " such a charge." Since the making of this statute, an affidavit
 verifying the certificate of acknowledgment by a married woman,
 under the 3 & 4 W. IV. c. 74, cannot be received, if sworn in *Ireland*,
 before a commissioner for taking affidavits in the Common Pleas in
Ireland^a: It must be sworn before a commissioner of the Common
 Pleas in *England*^a.

Affidavits sworn
 before attorney
 in country, or
 attorney's clerk.

By the general practice of all the courts, *affidavits* sworn before
 the attorney or solicitor in the cause, cannot be read^b; and this prac-
 tice extends to affidavits taken before attornies, as commissioners, in
 causes wherein they are concerned for the parties on whose behalf
 such affidavits are made, except where they are made for the pur-
 pose of holding the defendant to special bail^c: But the rule which
 prohibits the swearing of affidavits before the attorney or solicitor in
 the cause, did not formerly extend to the attorney's clerk; and there-
 fore, an affidavit might have been made before a clerk of the attor-
 ney in the cause, if such clerk were empowered to take affidavits^d.
 So, in the Common Pleas, if the agent in town were the attorney on
 record, it was no objection to an affidavit of the party, that it was
 sworn before his own attorney in the country^e. But now, by a gene-
 ral rule of all the courts^f, "where an agent in town, or an attorney
 in the country, is the attorney on the record, an affidavit sworn before
 the attorney in the country shall not be received; and an affidavit
 sworn before an attorney's clerk shall not be received, in cases where
 it would not be receivable, if sworn before the attorney himself; but
 this rule shall not extend to affidavits to hold to bail."

^a *In re Anderson*, 2 Scott, 626.

& E. 638.

^b *Tidd Prac.* 9 Ed. 494. (c.)

^c *Read v. Cooper*, 5 Taunt. 89.; and

^d R. E. 15 Geo. II. reg. II. K. B.

see *Williams v. Hockin*, 8 Taunt. 435.

R. E. 13 Geo. II. reg. I. C. P. *Ante*, 124;

Tidd Prac. 9 Ed. 494.

and see *Bates v. Sherwood*, 13 Leg. Obs. 109.

^f R. H. 2 W. IV. reg. I. § 6. 3 Barn. &

^a *Goodtitle d. Pyc v. Badtitle*, 8 Durnf.

Ad. 375. 8 Bing. 289. 2 Crompt. & J. 169.

In the King's Bench, it was a rule ^a, that "no rules, orders, or notices, in any cause or matter depending in that court, should be served, nor any proceedings or pleadings delivered or served, later than *ten* of the clock at night; and any service or delivery thereof, after that hour, should be null and void:" but the service of a copy of a writ of *latitat*, &c. was not within this rule ^b. In the Common Pleas it was a rule ^c, that "all declarations and pleadings should be delivered, all demands thereof made, and all notices given, before *nine* o'clock in the evening."^d In the Exchequer of Pleas, by a general rule of that court ^e, "all notices, summonses, rules, and orders, shall be so served or delivered as therein mentioned, before *nine* o'clock in the evening." But, by a general rule of all the courts ^f, "service of rules and orders, and notices, if made before *nine* at night, shall be deemed good; but not if made after that hour."

Service of rules,
&c. when made.

To bring a party into contempt, a copy of the rule must be *personally* served ^g; and the original at the same time shewn to him ^h. And the courts will not, in general, dispense with *personal* service of the rule, or of the master's or prothonotaries' *allocatur* on which it is founded, on an *affidavit* that the defendant keeps out of the way, to avoid being served ⁱ. When it is not intended to bring the party into contempt,

How made, to
bring party into
contempt.

In other cases.

^a R. M. 41 Geo. III. K. B. 1 East, 132.

^b Anon. 2 Chit. R. 357. Upton v. Mackenzie, 1 Dowl. & R. 172.

^c R. E. 10 Geo. II. C. P.

^d Tidd *Prac.* 9 Ed. 499, 500.

^e R. M. 1 W. IV. reg. II. § 9. 1 Crompt. & J. 278, 9. 1 Tyr. Rep. 161; but see *Horley v. Purdon*, 2 Dowl. Rep. 228. 7 Leg. Obs. 110, 11. S. C. Excheq.

^f R. H. 2 W. IV. reg. I. § 50. 3 Barn. & Ad. 380. 8 Bing. 295. 2 Crompt. & J. 182.

^g *Rex v. Smithies*, 3 Durnf. & E. 351. *Garland v. Goulden*, 2 Younge & J. 89. *Barnes (or Baines) v. Williams*, 1 Dowl. Rep. 615. 5 Leg. Obs. 240, 41. S. C. *Parker v. Burgess*, 3 Nev. & M. 36. *Woollison v. Hodgson*, 3 Dowl. Rep. 178. *Richmond v. Parkinson*, 3 Dowl. Rep. 703. *Rotch v. Laing*, 11 Leg. Obs. 272, 3. *per Patteson, J.*

^h *Rex v. Smithies*, 3 Durnf. & E. 351. *Bellairs v. Poultney*, 6 Maule & S. 230. 1 Chit. R. 466, 7. (a.) S. C. *Reid v. Deer*,

7 Dowl. & R. 612. *Wadsworth v. Marshall*, 1 Crompt. & M. 87. *Rex v. Sloman*, 1 Dowl. Rep. 618. 5 Leg. Obs. 144. S. C. *Rex v. Wood*, 1 Dowl. Rep. 509. Anon. 5 Leg. Obs. 145. (a.) S. C. *Calvert v. Redfearn*, 2 Dowl. Rep. 505. 8 Leg. Obs. 380. S. C. *per Taunton, J.* *Granger v. Fry*, 5 Dowl. Rep. 21. 12 Leg. Obs. 289. S. C.

ⁱ Anon. 1 Chit. R. 503; and see Anon. 1 Dowl. & R. 529. *In re Lowe & Johnson*, 4 Barn. & Ad. 412. *Stunnell v. Tower*, 1 Crompt. M. & R. 88. 4 Tyr. Rep. 862. 2 Dowl. Rep. 673. S. C. 9 Leg. Obs. 38, 9. *Albin v. Toomer*, 3 Dowl. Rep. 563. 1 Har. & W. 215. 10 Leg. Obs. 109. S. C. *Richmond v. Parkinson*, 3 Dowl. Rep. 703. *Rotch v. Laing*, 11 Leg. Obs. 272, 3. *Birket v. Holme*, 4 Dowl. Rep. 556. 1 Har. & W. 659. S. C. *per Patteson, J.* *In re Ibbertson*, 5 Dowl. Rep. 160. 12 Leg. Obs. 214. S. C.; but see *In re Bower*, 1 Barn. & C. 264. *Green v. Prosser*, 2 Dowl. Rep. 99. 6 Leg. Obs. 493. S. C. *Allier v. Newton*, 2 Dowl. Rep. 582. 8

the same degree of strictness is not required, in the service of the rule ; but it is sufficient to leave a copy of it with the person representing the party, at his dwelling house, or place of abode ^a; or, in the case of a prisoner, with the turnkey of the prison in which he is detained ^b. A rule however, cannot be served at the last place of an attorney's abode, unless it appear to be the one stated in the residence book, or that none is there stated ^c. And service of a rule on an attorney, by leaving it with a laundress at his chambers, who stated that she was authorized to receive notices and papers for him ^d, or at a place where letters and parcels were directed to be left for him ^e, has been deemed insufficient. In order to make a special service of a rule good, the deponent must swear to his belief of the statements which he relates as made by others, and on which the application is founded ^f. And, in general, the affidavit of a service of a rule must allude to the "*rule annexed*," and not the "*rule in this cause*." ^g

In Exchequer.

In the Exchequer of Pleas, all pleadings must formerly have been delivered to, and summonses, orders, rules, notices, and other proceedings, served on the sworn or side clerks, at their seats in the office of Pleas ^h: But, by a general rule of that court ⁱ, "the service of all pleadings, summonses, orders, rules, notices, and other pro-

Leg. Obs. 463. S. C. *per Patten*, J. *Leaf v. Jones*, 3 Dowl. Rep. 315. *per Patten*, J. *Levy v. Duncombe*, 1 Crompt. M. & R. 737. 5 Tyr. Rep. 490. 1 Gale, 60. 3 Dowl. Rep. 447. 9 Leg. Obs. 379. S. C. *Rex (or Rose) v. Koope*, 3 Dowl. Rep. 566. 10 Leg. Obs. 109, 10. 1 Har. & W. 213. S. C. *Wenham v. Downes*, 3 Dowl. Rep. 573. 1 Har. & W. 216. 10 Leg. Obs. 62. S. C. *per Williams*, J. *Phillips v. Hutchinson*, 3 Dowl. Rep. 583. 10 Leg. Obs. 110. S. C. *In re Barwick*, 3 Dowl. Rep. 703. 5 Tyr. Rep. 431. S. C. *Bottomley v. Belchamber*, 1 Har. & W. 362. 4 Dowl. Rep. 26. 10 Leg. Obs. 507, 8. S. C. *Rex v. Dignam*, 4 Dowl. Rep. 359. 11 Leg. Obs. 86, 7. 390. S. C. *Hinton v. Dean*, 4 Dowl. Rep. 352. 11 Leg. Obs. 391. S. C.; in which latter cases, under particular circumstances, *personal* service of the rule was dispensed with.

^a Anon. 2 Price, 4; and see *Poole v. Sweeting*, 1 Price, N. R. 171. *Engleheart v. Morgan*, 1 Dowl. Rep. 422. 4

Leg. Obs. 283. S. C. *George v. Baynton*, 6 Leg. Obs. 124, 5. *per Taunton*, J. *Ridgway v. Baynton*, 2 Dowl. Rep. 183. 6 Leg. Obs. 413. S. C.

^b *Moore v. Newbold*, 11 Leg. Obs. 307.

^c *Re Sandys*, 1 Dowl. Rep. 362. *per Taunton*, J.

^d *Dodd v. Drummond*, 1 Dowl. Rep. 381. 4 Leg. Obs. 267. S. C. *per Taunton*, J.; and see *Smith v. Spurr*, 2 Dowl. Rep. 231. 7 Leg. Obs. 316, 17. S. C. *Strutton v. Hawkes*, 3 Dowl. Rep. 25. *Alanson v. Walker*, 3 Dowl. Rep. 258. *per Gurney*, B.

^e *Stout v. Smith*, 1 Dowl. Rep. 506. 5 Leg. Obs. 353. S. C. *per Littledale*, J.

^f *Kent v. Jones*, 3 Dowl. Rep. 210. 9 Leg. Obs. 252. S. C.

^g *Fidlett (or Ticklett) v. Bolton*, 4 Dowl. Rep. 282. 11 Leg. Obs. 117. S. C.

^h *Tidd Prac.* 9 Ed. 72. 500.

ⁱ R. M. 1 W. IV. reg. II. § 7. 1 Crompt. & J. 277. 1 Tyr. Rep. 159.

ceedings, heretofore served on the sworn or side clerks, at their seats in the said office of Pleas, shall hereafter be served upon the attorney or attorneys of the adverse party or parties, by delivering the same to, or leaving the same for him, in the manner therein mentioned; and that henceforth no entry of any notice shall be required to be made in any book, to be kept in the said office of pleas, as heretofore." And, by another rule of the same court ^a, "in all cases where a defendant shall have appeared in any action in the office of pleas, and in cases where the plaintiff has entered an appearance therein according to the statute, and the defendant shall, by an attorney of that court, have given notice in writing to the attorney for the plaintiff, or his agent, of his being authorized to act as attorney for such defendant, all proceedings, notices, and summonses, rules and orders, which, according to the practice of that court, were theretofore delivered by the sworn or side clerks of the other party, plaintiff or defendant, may be delivered to, or served upon the attorney or attorneys of the other party, plaintiff or defendant."

In the King's Bench ^b, and Exchequer ^c, it does not seem to have been formerly necessary to shew the original rule, at the time of service, except in cases of attachment. In the Common Pleas, it seems that, in order to make a perfect service of a rule, the original rule must have been sworn to have been shewn to the party, at the time of serving the copy ^d. But, by a general rule of all the courts ^e, "it shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment."

On service of rules, not necessary to shew original, unless demanded, or in cases of attachment.

When a rule to shew cause had been served, it was formerly usual to give notice to the counsel for the adverse party, of an intended application to the court for enlarging it; and, in the Common Pleas, the court would not have enlarged a rule for shewing cause, unless notice had been given of motion to enlarge the rule, and affidavit made of such notice ^f; but no notice was necessary, when the rule had not been served: And, by a general rule of all the courts ^g, "a

Enlarging rule.

^a R. M. 1 W. IV. reg. II. § 9. 1 Comp. & J. 278. 1 Tyr. Rep. 160, 61.

^b Rex v. Smithies, 3 Durnf. & E. 351. Bellairs v. Poultney, 6 Maule & S. 230. 1 Chit. R. 466, 7. (a.) S. C.

^c Farnstone v. Taylor, 2 Younge & J. 30.

^d Wye v. Wright, Barnes, 403. Pr. Reg. 264. S. C.; but see Holmes v. Senior, 4 Moore & P. 828. 7 Bing. 162. S. C. and see Tidd Prac. 9 Ed. 480. 500.

^e R. H. 2 W. IV. reg. I. § 51. 3 Barn. & Ad. 381. 8 Bing. 295. 2 Comp. & J. 182.

^f N. M. 2 Geo. II. C. P. and see Anon. Cas. Pr. C. P. 67. Tidd Prac. 9 Ed. 502, 3.

^g R. H. 2 W. IV. reg. I. § 97. 2 Barn. & Ad. 389. 8 Bing. 303. 2 Comp. & J. 196.

rule may be enlarged, if the court think fit, without notice." In the King's Bench, where a rule was enlarged to a subsequent term, on the usual terms of filing the affidavits a week before the term, the court refused to hear affidavits filed afterwards^a. But it is not the practice to serve enlarged rules; because both parties are before the court^b. And it does not appear to be necessary to take office copies of affidavits, in support of an enlarged rule^c. In the Exchequer, upon an enlarged rule, the affidavits must be filed before shewing cause, although it be not so expressed in the rule of enlargement^d. But, in that court, where a rule was enlarged from *Trinity* to *Michaelmas* term, affidavits filed a week before the latter term, were holden to be in time^e.

Shewing cause
against rule, at
chambers.

In cases of executions, and other matters requiring an early decision, the courts, towards the end of the term, will sometimes grant a rule *nisi*^f, or enlarge a rule previously granted, till a day in *vacation*; when it is to be brought on before a judge at chambers^g. And where the coroner had returned *cepi corpora*, to writs of attachment against the sheriff of *Middlesex*, the court of King's Bench, on the last day of term, granted writs of *habeas corpora*, without an *affidavit*, to bring up the bodies of the sheriffs, before one of the judges at chambers, to answer to such matters as should be there alleged against them^h. So, the court allowed cause to be shewn at chambers, on a rule to set aside an *attachment* for nonpayment of costs, pursuant to the master's *allocatur*ⁱ. But rules for judgment as in case of a nonsuit, in country causes, should be applied for early in an issuable term, in order that the plaintiff may have sufficient time to shew cause in the same term; or the court will enlarge the rule till the next term, and not permit the parties to discuss it at chambers^j: and the court will not, at the close of the term, grant a rule *nisi*, to shew cause at chambers, when the party could have come earlier^k. The practice of shewing cause at chambers was said, in the latter case, to be quite modern: And, in the Exchequer, the court, on a motion for an attachment for nonpayment of money, refused to allow cause to be shewn at chambers,

^a *Turner v. Unwin*, 1 Har. & W. 186.

⁴ Dowl. Rep. 16. 10 Leg. Obs. 204. S. C.

^b *Anon.* 1 Smith R. 199.

^c *Foy v. Pitt*, 9 Leg. Obs. 269.

^d *Barker v. Richardson*, 1 Younge & J. 362.

^e *Johnson v. Marriat*, 2 Dowl. Rep. 343.

^f For the form of a rule to shew cause

before a judge at chambers, see Append. to Tidd Prac. 9 Ed. Chap. XIX. § 13. (a.) 14. (a).

^g *Rex v. Whaley*, 1 Chit. R. 249. Tidd Prac. 9 Ed. 314. 481.

^h *Rex v. C. D.* 2 Chit. Rep. 723.

ⁱ *Picker v. Webster*, 1 Chit. R. 232. and see *id.* (a.) *George v. Chapman*, 9 Leg. Obs. 475. per *Patteson*, J.

^k *Anon.* 2 Chit. R. 366.

though it was at the end of the term ^a. So, where the sheriff applies to the court for a rule under the interpleader act ^b, or upon a motion to discharge a debtor, who has been in custody twelve months, for a debt under 20*l.* ^c, the court, it has been said, has no power to order cause to be shewn at chambers: And they would not allow it to be done in *ejection*, where the *affidavit* of service of the declaration was defective ^d.

Rules of court are not, generally speaking, considered as *records*, but only *remembrances* of the proceedings ^e; and are not entered upon the rolls of the court ^f: But, by the *interpleader* act ^g, "all rules, orders, matters and decisions, to be made and done in pursuance of that act, except only the *affidavits* to be filed, may, together with the declaration in the cause, if any, be entered of record, with a note in the margin, expressing the true date of such entry; to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs, directed by such rule or order; and every such rule or order so entered, shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments."

Rules not records.

Entry of, on record, by interpleader act.

Force and effect of, when entered.

In the Common Pleas at *Lancaster*, by the late act for improving the practice and proceedings in that court ^h, "in case any rule of the said court of Common Pleas at *Lancaster* cannot be enforced, by reason of the non-residence of any party or parties within the jurisdiction thereof, it shall be lawful, upon a certificate of such rule, by the prothonotary of the said court, and an *affidavit* that by reason of such non-residence, such rule cannot be enforced as aforesaid, to make such rule a rule of any one of the said courts at *Westminster*, if such court shall think fit; whereupon such rule shall be enforced, as a rule of such court." And there is a similar clause, in the late act, for the better and more expeditious administration of justice, in the Stannaries of *Cornwall* ⁱ.

Enforcing rules of C. P. at Lancaster.

Of Stannary courts in Cornwall.

^a *Fall v. Fall*, (or *Full v. Full*), 2 Dowl. Rep. 88. 6 Leg. Obs. 461. S. C.

^b *Shaw v. Roberts*, 2 Dowl. Rep. 25. 6 Leg. Obs. 444, 5. S. C.; but see *Poweler v. Lock*, 4 Nev. & M. 852, S. per Ld. *Denman*, Ch. J. *Beames v. Cross*, 4 Dowl. Rep. 122. *Hailey* (or *Hains*) *v. Disney*, 1 Hodges, 189. 2 Scott, 183. S. C. *contra*.

^c *Jones v. Fitzaddams*, 2 Dowl. Rep. 111. 3 Tyr. Rep. 904. 1 Crompt. & M. 855. 6 Leg. Obs. 493. S. C.

^d *Doe d. Williams v. Roe*, 2 Dowl. Rep. 89. per *Bayley*, B.

^e *Tidd Prac.* 9 Ed. 490.

^f *Wynne v. Wynne*, 1 Wils. 35. 40. *Lewis v. Morland*, 2 Barn. & Ald. 56. 61. *Rex v. Bingham*, 3 Younge & J. 101. 105. 109. 112, 13, 14. 1 Crompt. & J. 245. S. C. in Error.

^g 1 & 2 W. IV. c. 58. § 7.

^h 4 & 5 W. IV. c. 62. § 32.

ⁱ 6 & 7 W. IV. c. 106. § 12.

Practice by
summons and
order.

It will next be proper to consider the practice by *summons* and *order* at a judge's chambers; and in what manner it is affected by recent statutes, and rules of court, and decisions thereon. This practice seems to have arisen, partly from the overflowing of the business of the courts in *term* time, and partly from the necessity of certain proceedings being had in *vacation*, when the courts are not sitting; and although extremely burdensome to the judges, yet it manifestly tends to the advantage of the suitor, the ease of the practitioner, and the general advancement of justice, by preventing the expense, trouble and delay, which must ensue, if an application to the courts were in all cases necessary^a.

Analogous to
proceedings in
court, by motion
and rule.

The practice we are now speaking of, is in many respects analogous to the proceedings in court, by *motion* and *rule*: the application to the judge at chambers, for a *summons*, answering to the *motion* for a rule of court; the *summons*, when granted, to a rule *nisi*; and the order of the judge, to a rule absolute: But there are some distinctions deserving notice, between these different modes of proceeding; for besides that the business done by a judge at chambers is in general of minor importance to that which is transacted in court, the *summons* is taken out by the parties, their attorneys or agents, but the motion for a rule is made by counsel. An *affidavit* also is in general required to support a motion for a rule of court; but it is seldom necessary, on applying for a judge's order^b; and rules of court are only granted in *term* time, but summonses and orders are also granted in *vacation*: And indeed, the business at chambers is, for obvious reasons, more considerable in *vacation*, than in *term* time^c.

How it differs.

Authority of
judge at cham-
bers.

Judge's orders
made in term
time, before re-
cent alterations.

On behalf of
plaintiff.

The authority of a judge at chambers, to make orders in the various cases which are brought before him, is, when considered upon principle, the authority of the court itself^d: and these orders are made in *term* time, or *vacation*. The orders commonly made at a judge's chambers in *term* time, before the alterations by recent statutes and rules of court, were, on behalf of the *plaintiff*, for admitting him to sue by *prochein ami*, when an infant, in the Common Pleas^e, or in *formâ pauperis*, when a pauper^f; for holding the defendant to special bail in *trover* or *detinue*^g, or other action for general damages^h, or on an

^a *Per* Ld. Mansfield, Ch. J. in *Rex v. Wilkes*, 4 Bur. 2569; and see *Tidd Prac.* 9 Ed. 509.

^b *Joseph v. Perry*, 3 Dowl. Rep. 699. 10 Leg. Obs. 255. S. C.

^c *Rex v. Wilkes*, 4 Bur. 2567.

^d *Per Tindal*, Ch. J. in *Dec d. Pres-*

cott v. Roe, 9 Bing. 105. 2 Moore & S. 119. 1 Dowl. Rep. 274. S. C.

^e *Tidd Prac.* 9 Ed. 100. *Ante*, 62. (f.)

^f *Id.* 97, 8.

^g *Id.* 172. 186, 7.

^h *Id.* 166.

affidavit made abroad ^a; to charge a person in custody, on a *criminal* account, in a civil action ^b; to amend the declaration ^c, or particulars of the plaintiff's demand ^d; or for particulars, or further particulars, of the defendant's set off ^e, &c. On behalf of the *defendant*, they were for admitting him, when an infant, to defend by guardian ^f; for staying proceedings on the bail bond ^g, or on payment of debt and costs ^h; for discharging a prisoner, when in custody of the marshal, or, if in custody of the warden, or sheriff, &c. for a *supersedeas* for his discharge, for not declaring, or for not proceeding to final judgment or execution, in due time ⁱ; for time to plead, or rejoin ^k, &c.; for a copy of the agreement on which the action is brought ^l; or to produce the same before commissioners of the stamp office, to be stamped ^m; or for producing papers to the underwriters, in actions upon policies of assurance ⁿ; or a copy of a deed, &c. to the grantor of an annuity ^o; for further particulars of the plaintiff's demand ^p; to amend particulars of defendant's set off ^q; for consolidating actions, in the Common Pleas ^r; to plead several matters ^s; or for amending a plea, or rejoinder ^t, &c. And, on behalf of *either* party, they were for changing an attorney ^u; or for the delivery and taxation of his bill of costs ^x; for a *good* jury, on the execution of a writ of inquiry ^y; or, by consent, for an order of reference to arbitration ^z, to enlarge the time for making an award ^{aa}, or examine witnesses upon interrogatories [†]. In *ejectment*, they are, on behalf of the *plaintiff*, to amend the declaration [‡], or notice to appear [§]; or, on behalf of the *defendant*, for particulars of the premises ^{||}, or breaches of covenant [¶], for which the action is brought. Matters of

On behalf of defendant.

On behalf of either party.

By consent.

In ejectment.

^a Tidd *Prac.* 9 Ed. 166.

^b *Id.* 345.

^c *Id.* 697.

^d *Id.* 599.

^e *Id.* 598, 9.

^f *Id.* 100.

^g *Id.* 303. Hughes v. Brand, 2 Dowl.

Rep. 131.

^h Tidd *Prac.* 9 Ed. 540.

ⁱ *Id.* 368, 9.

^k *Id.* 469.

^l *Id.* 590. Neale v. Swind, 2 Crompt.

& J. 278. 2 Tyr. Rep. 318. 1 Dowl. Rep.

314. S. C. Read (or Reid) v. Coleman, 2

Dowl. Rep. 354. 2 Crompt. & M. 456.

4 Tyr. Rep. 274. S. C.

^m Tidd *Prac.* 9 Ed. 487. 590. Vaughan

v. Trewent, 2 Dowl. Rep. 399. Wright v.

Cross, 8 Leg. Obs. 491. (a.) per Parke,

B.

ⁿ Tidd *Prac.* 9 Ed. 591.

^o *Id.* *ib.*

^p *Id.* 596. 598.

^q *Id.* 598, 9.

^r *Id.* 615.

^s *Id.* 486. 510. 658. R. T. 1 W. IV. reg. ix. 7 Bing. 784, 5.

^t Tidd *Prac.* 9 Ed. 697.

^u *Id.* 94.

^x *Id.* 325. Bassett v. Giblett, 2 Dowl. Rep. 650. 8 Leg. Obs. 491. S. C. per Parke, B.

^y Tidd *Prac.* 9 Ed. 484. 486. 576. 787.

R. H. 2 W. IV. reg. I. § 101. 8 Bing. 304.

^z Tidd *Prac.* 9 Ed. 485. 819.

^{aa} *Id.* 485. 826, 7.

[†] *Id.* 485. 810.

[‡] *Id.* 1206, 7.

[§] *Id.* 1231.

[¶] *Id.* 600. 1231, 2.

Against attor-
nies.

complaint against attorneys, are also frequently heard before judges at chambers ^a; and a judge at chambers has power to make an order on an attorney in a cause, to pay money ^b: but unless there is a cause in court, an application cannot be made at chambers against an attorney ^c. And a judge at chambers will not interfere, when a statute directs the application to be made to the court ^d.

In vacation.

In addition to the orders which may be made in *term* time, some things are allowed to be done by a judge at chambers in *vacation*, which in *term* time must be moved in court; as, on behalf of the *plaintiff*, to issue a writ of *distringas* ^e; for entering up judgment on a warrant of attorney, above *one* and under *ten* years old ^f; and, on behalf of the *defendant*, to discharge him out of custody, on entering a common appearance, if there be no *affidavit* to hold to bail, or the *affidavit* be defective, or not duly filed ^g, &c.; to put off the trial, for the absence of a material witness ^h; for setting aside an irregular judgment, signed in vacation ⁱ; or discharging persons under writs of execution, when improperly taken out ^k. And though a judge at chambers will not, in general, set aside an execution, or other act of the court, yet, where the justice of the case requires it, he will stay the proceedings thereon in *vacation*, to give the party an opportunity of applying to the court in the ensuing term ^l.

Judge's order
for drawing up
rule in.

When a rule is drawn up in *term* time, as a matter of course, on a motion paper signed by counsel, as to change the venue ^m, or for a special jury ⁿ, &c. a judge's order, or *fiat* ^o, may be had in the first instance, for the clerk of the rules in the King's Bench or Exchequer,

^a *Ex parte* Townley, 3 Dowl. Rep. 39. And for these and other matters relating to the practice by summons and order at a judge's chambers, and the proceedings thereon, see Bagley's Practice, Chap. I. &c.

^b *Wilson v. Northop*, 2 Crompt. M. & R. 326; and see *Same v. Same*, 4 Dowl. Rep. 441. 12 Leg. Obs. 75. S. C.

^c *Ex parte* Higgs, 1 Dowl. Rep. 495. *Ex parte* James, 5 Leg. Obs. 158. S. C. per Littledale, J.

^d *Ante*, 249. *Post*, Chap. XLI.

^e *Ante*, 77.

^f *Tidd Prac.* 9 Ed. 553. R. H. 2 W. IV. reg. I. § 73. 8 Bing. 299.

^g *Tidd Prac.* 9 Ed. 188, 9.

^h *Id.* 772. *Paine v. Bustin*, 1 Stark. Ni. Pri. 74, 5. *Atkinson v. Dickinson*, 3

Campb. 41, 2. *Buxton v. Lawton*, 4 Campb. 163.

ⁱ *Tidd Prac.* 9 Ed. 567, 8. *Doe d. Prescott v. Roe*, 9 Bing. 104. 2 Moore & S. 119. 1 Dowl. Rep. 274. S. C.; and see *Hargrave v. Holden*, 3 Dowl. Rep. 176.

^k *Doe d. Prescott v. Roe*, 9 Bing. 104. 2 Moore & S. 119. 1 Dowl. Rep. 274. S. C.

^l *Tidd Prac.* 9 Ed. 511. *Spicer v. Todd*, 2 Crompt. & J. 165. 2 Tyr. Rep. 172. 1 Dowl. Rep. 306. S. C.

^m *Tidd Prac.* 9 Ed. 486. 510. 609, 10.

ⁿ *Id.* 486. 510. 792.

^o For the form of a judge's order, or *fiat*, for drawing up a rule in vacation, see *Append. to Tidd Prac.* 9 Ed. Chap. V. § 19. Chap. XII. § 38.

or secondaries in the Common Pleas, to draw it up in *vacation*, on producing a motion paper so signed. And it seems that a judge's order may be obtained, in like manner, for drawing up a rule in *vacation*, to refer it to the master or prothonotary, to compute principal and interest on bills of exchange, or promissory notes ^a, &c.: and, in the Common Pleas, a rule absolute may be drawn up for that purpose during term, on the order of a judge dated in vacation ^b. The practice of shewing cause at a judge's chambers in *vacation*, against a rule of court obtained in *term* time, has been already considered ^c.

In making the above orders, the authority of the judges was formerly confined to actions, or prosecutions, depending in their respective courts; which occasioned great inconvenience, particularly when the judges were on their circuits. To remedy this inconvenience, it was enacted by the statute 1 Geo. IV. c. 55 ^d, that "it should and might be lawful for the justices of the courts of King's Bench and Common Pleas, and the barons of the Exchequer at *Westminster*, and the justices of *Chester*, during their respective circuits, for taking the assizes, to grant such and the like summonses, and make such and the like orders, in all actions and prosecutions depending in any of his majesty's courts of record at *Westminster*, in which the issue, if brought to trial would be to be tried, upon such their respective circuits, as if such justices of the courts of King's Bench, &c. were respectively judges of the court in which such actions or prosecutions are pending, although such respective justices may not be judges of the court in which such actions or prosecutions are depending: And, for the purposes of this act, the counties palatine of *Lancaster*, *Durham*, and *Chester*, shall be taken to be counties on the circuits of the respective justices of the courts of King's Bench, &c."

On circuits.

In county palatine.

By Lord *Tenterden's* act ^e, the judge at *nisi prius* is authorized to amend the record at the trial, in cases where any variance appears between written or printed evidence and the record; or, by the law amendment act ^f, where there is any variance between the proof and the recital or setting forth on the record, of any contract, &c. in any particular not material to the merits of the case, and by which the opposite party cannot have been prejudiced. By the speedy judgment and execution act ^g, a judge's order may be obtained for staying judgment on return of a writ of inquiry, executed pursuant to

At *nisi prius*.

By *Ld. Tenterden's* act, &c.

By speedy judgment and execution act.

^a Tidd *Prac.* 9 Ed. 486. 511. 570.

^e 9 Geo. IV. c. 15.

^b *Swaine v. Stone*, 4 Moore & S. 584.

^f 3 & 4 W. IV. c. 42. § 23.

^c *Ante*, 248.

^g 1 W. IV. c. 7. § 1.

^d § 5.

By law amendment act.

that act, until a day to be named in such order. And there is a similar provision in the law amendment act, 3 & 4 W. IV. c. 42. § 18., for staying judgment, or execution, on the return of writs of inquiry, for assessing damages on the statute 8 & 9 W. III. c. 11. § 8., or writs of trial.

By rule of court, on administration of justice act.

By a rule of court made by all the judges, in pursuance of the power given them by the administration of justice act^a, "there shall be no rule for the sheriff to return a *good jury*, upon a writ of inquiry; but an order shall be made by a judge on summons for that purpose:" And the rule to plead several matters, or make several avowries or cognizances, which will be more fully stated in a subsequent chapter^b, may, we have seen^c except in certain cases, be drawn up on a judge's order^d, to be made upon a summons^e, accompanied by a short abstract or statement of the intended pleas, avowries or cognizances^f:

On law amendment act.

Also, by rules of court founded on the law amendment act^g, a judge is authorized to make an order for striking out unnecessary counts, pleas, avowries or cognizances^h, and touching the admission of written or printed documents at the trialⁱ.

Attendance of judges, at chambers.

It was formerly usual for the judges to attend, for transacting business at chambers, in the *evening*, during term: but it is now the practice, in consequence of subsequent regulations^k, for one of the judges to attend daily at chambers during *term*, from half an hour after *three* till *five* o'clock in the afternoon; and in *vacation*, they usually attend from *eleven* to *one* o'clock.

Taking out summons.

A summons, when necessary, is taken out by the attorney or agent of the party who seeks to obtain the order; and may be had, as a matter of course, on application at the judge's chambers. But the order of a judge is sometimes granted, without any previous summons; as to hold the defendant to bail in *trover* or *detinue*^l, &c. to issue a writ of *distringas* in vacation^m, or to charge a prisoner in custody on a criminal account, with a civil actionⁿ, &c. In these cases, the order is necessarily *ex parte*; there being no one before the court, upon whom the summons, if issued, could be served. But in general

Judge's order, without previous summons.

^a R. H. 2 W. IV. reg. I. § 101.

^b Post, Chap. XXVII.

^c Ante, 238.

^d Append. to Tidd Sup. 1832. p. 115.

^e Id. 114.

^f Id. ib.

^g 3 & 4 W. IV. c. 42. § 1. 15.

^h R. Pl. Gen. H. 4 W. IV. reg. 6. 5
Barn. & Ad. Append. iv. 10 Bing. 466.
2 Crompt. & M. 15.

ⁱ R. Pl. H. 4 W. IV. reg. 20. 5 Barn.
& Ad. Append. xvii. 10 Bing. 456. 2
Crompt. & M. 6, 7.

^k Notice, M. 3 Geo. IV. C. P. &
Excheq. 7 Moore, 460. 11 Price, 452;
and see 5 Barn. & Ald. 217.

^l Tidd Prac. 9. Ed. 171, 2.

^m Ante, 74.

ⁿ Tidd Prac. 9 Ed. 345.

an order is preceded by a *summons*, for the attendance of the attorney or agent of the opposite party, before a judge at chambers, to shew cause against it. A judge's order is in some cases drawn up, in default of appearance, on the *first* summons; as for a *supersedeas* to discharge the defendant out of custody, in the King's Bench, for not declaring against him in due time. In general, however, there must formerly have been *three* summonses, and an *affidavit* of attendance thereon, before the judge would make an order for non-attendance^a. But, by a general rule of all the courts^b, "it shall not be necessary to issue more than *two* summonses, for attendance before a judge, upon the same matter; and the party taking out such summonses shall be entitled to an order, on the return of the *second* summons, unless cause is shewn to the contrary."^c By a subsequent rule of all the courts^d, "the order of a judge for the discharge of a prisoner, on the ground of a plaintiff's neglect to declare, or proceed to trial or final judgment, or execution, in due time, may, we have seen^e, be obtained at the return of *one* summons, served *two* days before it is returnable; such order, in *town* causes, being absolute, and in *country* causes, unless cause shall be shewn within *four* days, or within such further time as the judge shall direct." And, by another rule of all the courts^f, "an order to deliver, or tax, an attorney's bill may be made at the return of *one* summons, the same having been served *two* days before it is returnable."

When drawn up on one or more summonses.

The summons being taken out, a copy of it should be regularly served, in like manner as a rule *nisi*^g, on the attorney or agent required to shew cause against it; and when taken out for time, or further time, to plead, and made returnable before the expiration of the time for pleading, it is a stay of proceedings, pending the application; but it is otherwise when taken out, or made returnable, after the expiration of the time for pleading^h. In the latter case, the plaintiff is at liberty to sign judgment before the summons is returnableⁱ; but if he neglect to do so, he

Service of summons, and when it operates as a stay of proceedings.

^a Tidd *Prac.* 9 Ed. 511.

^b R. T. 1 W. IV. reg. V. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 471.

^c For the form of an *affidavit* of service of two summonses, and non-attendance thereon, see Append. to Tidd *Sup.* 1832. p. 112.

^d R. H. 2 W. IV. reg. 1. § 89. 3 Barn. & Ad. 387, 8. 8 Bing. 302. 2 Crompt. & J. 194.

^e *Ante*, 190.

^f R. H. 2 W. IV. reg. I. § 91. 3 Barn. & Ad. 388. 8 Bing. 302, 3. 2 Crompt. & J. 194.

^g *Ante*, 245, 6.

^h Tidd *Prac.* 9 Ed. 470. (*d.*); and see Knowles v. Vallance, 1 Gale, 16. Roberts v. Cuttill, 4 Dowl. Rep. 204. 10 Leg. Obs. 380. S. C.

ⁱ Calze v. Ld. Lyttelton, 2 Blac. Rep. 954; and see Morris v. Hunt, 1 Chit. R. 97. 2 Barn. & Ad. 356. S. C. Barnett v. Newton, 1 Chit. R. 689.

cannot afterwards sign judgment ^a; it being a rule, that if the summons be returnable before judgment signed, it prevents the plaintiff from afterwards signing it ^b. When the object of the summons is *collateral* to the time for pleading ^c, as to discharge the defendant out of custody on filing common bail, it will not, in general, operate as a stay of proceedings.

Proceedings on
summons.

The attorney or agent required to shew cause, on being served with a *copy* of the summons, either indorses his consent to an order being made upon it, attends the judge, or makes default. In the latter case, the attorney or agent for the opposite party, after waiting half an hour ^d, should take out a *second* summons, (if necessary,) which should be served and attended, in like manner as the first; and if default be made upon *two* summonses ^e, the judge, on *affidavit* thereof, will make an order *ex parte*: but if either of the summonses be attended, the judge will make an order upon, or discharge it, as he sees cause. And where a judge has, upon hearing a party on summons, refused an order, an appeal can only be made to the court ^f.

Power of
judge at cham-
bers, to award
costs.

It was formerly holden, in the King's Bench, that a judge at chambers had no power to award costs on *summonses* ^g; and this point was afterwards admitted by counsel, in a case in the Exchequer^h: but there is an express decision to the contrary, in the Common Pleas^k. And it was at length resolved by all the judges, that a single judge at chambers has power to give costs upon a summons^l; but they also, at the same time, resolved not to exercise this power, in any but extreme cases ^m. Where the plaintiff signed an irregular judgment, and

^a *Morris v. Hunt*, 2 Barn. & Ald. 355.
1 Chit. R. 93. S. C.

^b *Same v. Same*, 1 Chit. R. 96, 7. *per Bayley*, J. *Redford v. Edie*, 6 Taunt. 240. *accord.*; and see *Wells v. Secret*, 2 Dowl. Rep. 447. 8 Leg. Obs. 173. S. C.

^c *Anon. per Cur. M.* 28 Geo. III. K. B.

^d *R. T.* 35 Geo. III. K. B. 6 *Durnf. & E.* 402. *R. E.* 23 Geo. III. C. P. Imp. C. P. 7 Ed. 233. 676; and see *Tidd Prac.* 9 Ed. 470.

^e *R. T.* 1 W. IV. *reg. V.* 2 Barn. & Ad. 789. 7 Bing. 784.

^f For the form of this affidavit, see *Append. to Tidd Sup.* 1832, p. 112.

^g *Wright v. Stevenson*, 5 Taunt. 850. *Thorpe v. Beer*, 1 Chit. Rep. 124. *Id.* 246. (a.)

^h *Read v. Lee*, 2 Barn. & Ad. 415.

Anon. 1 Dowl. Rep. 52. 2 Leg. Obs. 60. S. C.

ⁱ *Spicer v. Todd*, 2 Crompt. & J. 165. 2 Tyr. Rep. 172. 1 Dowl. Rep. 306. S. C.

^k *Doe d. Prescott v. Roe*, 2 Moore & S. 119. 9 Bing. 104. 1 Dowl. Rep. 274. S. C.; and see *Foster (or Forster) v. Burton*, 3 Tyr. Rep. 388. 1 Dowl. Rep. 683. 5 Leg. Obs. 513, 14. S. C. *Hughes v. Brand*, 2 Dowl. Rep. 131. Excheq.

^l *In re Bridge & Wright*, 4 Nev. & M. 5. 2 Ad. & E. 48. S. C.; and see *Spicer v. Todd*, 2 Crompt. & J. 165. 2 Tyr. Rep. 172. 1 Dowl. Rep. 306. S. C. *Hargrave v. Holden*, 3 Dowl. Rep. 176.

^m *In re Bridge & Wright*, 4 Nev. & M. 5. 2 Ad. & E. 48. S. C. *Sheriff v. Gresley*, 5 Nev. & M. 491. 1 Har. & W. 588. S. C. *Doe d. Prescott v. Roe*, 2 Moore &

on the defendant taking out a summons to set it aside, he informed the defendant that the judgment was withdrawn, the court held that the defendant had no right to get an order drawn up for setting aside the judgment with costs; and therefore that he was liable to pay the expense of it ^a. And where a judgment was set aside for irregularity, on a summons before a judge at chambers, and no order was made as to costs, the court refused to order the payment of costs of setting aside the judgment, and discharged a rule obtained for that purpose, with costs ^b. It is not usual for the judges to give costs at chambers, on the discharge of a summons ^c: but where an action of debt having been settled, a summons was afterwards taken out by the defendant, to set aside the proceedings on the ground of irregularity, which was dismissed, a rule was granted to shew cause, why the costs of attending to set aside the summons should not be paid ^c. The court of Common Pleas, in a late case ^d, set aside a judge's order for better particulars of set off, on the ground that the plaintiff's attorney's clerk had, without authority, altered the date of the *jurat* of the *affidavit* on which the order had been obtained: Also, upon setting aside an irregular judgment of *non pros*, they imposed the condition of payment of costs by the plaintiff's attorney, on the ground that his clerk had, without authority, although without any sinister motive, inserted the word *peremptory* in the judge's summons for an attendance at his chambers on the subject ^d; and the practice of such unauthorized interpolations of the acts of the court was severely censured ^d.

The order of a judge is *absolute*, or *conditional* on payment of costs ^e, &c. But though a judge at chambers may make an order for staying the proceedings on payment of debt and costs, he cannot order payment by instalments; nor give the defendant more time, than he would have had by law ^f. The order of a judge for time, or further time to plead, and other serviceable orders, whether by consent or otherwise, should be regularly drawn up and served: it being a rule, in the King's Bench ^g, that "no summons for further time to plead, reply, or rejoin, or summons for further particulars of the plain-

Judge's order absolute, or conditional.

Must be drawn up, and served.

S. 119. 9 Bing. 104. 1 Dowl. Rep. 274.

S. C. *per Tindal*, Ch. J. *Sheriff v. Gresley*,

5 Nev. & M. 491. 1 Hur. & W. 588. S. C.

^a *Hargrave v. Holden*, 3 Dowl. Rep. 178.

^b *Davy v. Brown*, 1 Bing. N. R. 460.

1 Scott, 384. 1 Hodges, 22. S. C.

^c *Thorncroft v. Dellis*, 11 Leg. Obs. 261.

^d *Finnerty v. Smith*, 1 Bing. N. R.

649. 1 Hodges, 158. 1 Scott, 743. S. C.

^e *Robertson v. Barker*, 2 Dowl. Rep.

39, 40. *Turner v. Gill*, 3 Dowl. Rep. 30.

9 Leg. Obs. 221. S. C.

^f *Kirby v. Ellier* (or *Ellison*), 4 Tyr.

Rep. 239. 2 Crompt. & M. 315. 2 Dowl.

Rep. 219. S. C.

^g R. H. 59 Geo. III. K. B.; and see

Sedgewick v. Allerton, 7 East, 542. 1 Chit.

R. 647. (a.) *Charge v. Farhall*, 4 Barn.

& C. 865. 7 Dowl. & R. 422. S. C.

Anon. 4 Leg. Obs. 124. *per Taunton*, J.

tiff's demand, defendant's set off, or other particular, be granted, in any action depending in that court, unless the last previous order for time, further time, or particulars respectively, be first drawn up, and such order produced at the time of applying for any such summons." And, in the Common Pleas, a consent indorsed on a judge's summons, is not binding on either party, unless the order be drawn up and served pursuant thereto^a. In that court also, if a summons be taken out for time to plead, and the defendant's attorney do not attend, the plaintiff must get the summons discharged, before he can sign judgment^b; but it is said to be otherwise in the King's Bench^c. Where, upon a summons attended at a judge's chambers, the judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such minute, or not^d. If he do not draw it up, and the party summoned considers that the order pronounced is in his favour, he should take out a cross summons, for the purpose of obtaining a similar order^d. And if parties, being before a judge at chambers, go by consent into matter not within the summons, and the judge make a minute of an order, the party in whose favour such minute is made, is, it seems, entitled to draw up an order accordingly^d. A recital of facts in a judge's order is not evidence of them, so as to admit the truth of the facts, on a demurrer to a pleading, in which the order is set out^e.

If acquiesced
under, valid.
When final.

If the order of a judge be acquiesced under, it is as valid as any act of the court^f: and, in the King's Bench, a judge's order for a prisoner's discharge under the Lords' act, made out of term, has been held to be final^g. So, the decision of a judge of assize, in remanding a prisoner under that act is final, up to the time of remanding^h: The decision of a judge at chambers, as to amendments of pleadings, within the limits of his discretionary power over such amendments, will not be interfered with by the courtⁱ. And the court in *banc*

^a Joddrel v. —, 4 Taunt. 253.

^b Rivers v. Plumlee, Barnes, 240. Browne v. Godfrey, *id.* 255. Cas. Pr. C. P. 144. S. C.

^c Imp. C. P. 7 Ed. 233.; and see Edensor v. Hoffman, 2 Crompt. & J. 140. 1 Price, N. R. 175. 1 Dowl. Rep. 304. S. C. Excheq.

^d Macdougall v. Nicholls, 5 Nev. & M. 366. 1 Har. & W. 462. S. C.

^e M'Cormick (or M'Cornish) v. Melton, 5 Tyr. Rep. 147. 1 Crompt. M. & R. 525. 3 Dowl. Rep. 215. S. C.

^f Per Ld. Mansfield, Ch. J. in *Rex v.*

Wilkes, 4 Bur. 2569. *Wood v. Plant*, 1 Taunt. 47; and see *Wentworth v. Bullen*, 9 Barn. & C. 840. 849, &c.

^g *Lench v. Pargiter*, Doug. 68. *Webster v. Wilkinson*, H. 26 Geo. III. K. B. *Jameson v. Raper*, 3 Moore, 65 (a.); and see *Tidd Prac.* 9 Ed. 382. 511.

^h *Briggs v. Sharp*, 6 Bing. 517. 4 Moore & P. 269. S. C.

ⁱ *Rex v. Archbishop of York*, 3 Nev. & M. 453. 1 Ad. & E. 394. S. C.; and see *Atkinson v. Bayntun*, 1 Bing. N. R. 740. 1 Hodges, 144. S. C.

have, it seems, no right to revise the opinion of a judge at *nisi prius*, in directing amendments of the record, under Lord *Tenterden's* act, 9 Geo. IV. c. 15^a; or refusing them, under the law amendment act, 3 & 4 W. IV. c. 42. § 23^b. But the court has power, in an action brought by executors, to review a judge's order, granting a discontinuance without costs^c.

The mode of *enforcing* the performance of a judge's order is by attachment: And where an attorney is in contempt, by disobeying a rule of court, founded on a judge's order, the proper course of proceeding against him is by moving for an attachment; and not by applying to strike him off the roll^d. But a *conditional* order, for payment of costs, cannot be enforced by attachment, although the step to be allowed on payment of costs has been taken, without such payment^e: If, indeed, it become necessary to enforce a judge's order by attachment, or other act of the court, there must be a previous motion to make it a rule of court^f. The rule for this purpose is absolute in the first instance^g; and an absolute rule may be drawn up during term, on an order of a judge dated in vacation^h: And where, from the misconduct of an arbitrator, the original order cannot be obtained, a duplicate may be made a rule of courtⁱ. But where a judge's order is obtained in vacation, it cannot be made a rule of court till the following term^k. A judge's order, however, for returning a writ, may be made a rule of court^l: and, in the King's Bench¹, and Exchequer^m, an attachment for disobedience thereto may be obtained on one

Mode of enforcing.

Making it a rule of court.

^a *Parks (or Parkes) v. Edge*, 1 Crompt. & M. 429. 3 Tyr. Rep. 364. *Parker v. Ade*, 1 Dowl. Rep. 643. S. C.

^b *Doe d. Poole, v. Errington*, 3 Nev. & M. 648. 651. *per Littledale, J.*; and see 3 Chit. Gen. Pr. 44. *Ante*, 24, 5.

^c *Lakin v. Massie*, 4 Dowl. Rep. 239. 1 Gale, 270. 11 Leg. Obs. 119. S. C.; but see *Maddox (or Maddocks) v. Phillips*, 1 Har. & W. 251. 5 Nev. & M. 370. 3 Ad. & E. 198. S. C. *contra*.

^d *Ex parte Townley*, 3 Dowl. Rep. 39. 9 Leg. Obs. 221. S. C.

^e *Rease (or Rex) v. Fenn*, 2 Dowl. Rep. 182. 6 Leg. Obs. 414. S. C.; and see *Turner v. Gill*, 3 Dowl. Rep. 30. 9 Leg. Obs. 221. S. C.

^f *Per Ld. Mansfield, Ch. J.* in *Rex v. Wilkes*, 4 Bur. 2569. *per Ld. Kenyon, Ch. J.* in *Curtis v. Taylor*, E. 85 Geo. III. K. B. *Hinchliffe v. Jones*, 4 Dowl. Rep.

86. 1 Har. & W. 337. S. C.

^g *Wilson v. Northop*, 2 Crompt. M. & R. 326.

^h *Swaine v. Stone*, 4 Moore & S. 584.

ⁱ *Thomas v. Philby*, 2 Dowl. Rep. 145. 6 Leg. Obs. 138. S. C. *per Patteson, J.*

^k *Rex v. Price*, 2 Crompt. & M. 212. 4 Tyr. Rep. 60. 2 Dowl. Rep. 233. 7 Leg. Obs. 333. 4. S. C.

^l *Hinchliffe (or Hunchliffe) v. Jones*, 4 Dowl. Rep. 86. 1 Har. & W. 337. 10 Leg. Obs. 475. S. C.; but see *Stainland v. Ogle*, 3 Dowl. Rep. 99. *Frost v. Green*, 10 Leg. Obs. 61. *per Littledale, J. contra. Ante*, 171.

^m *Howell v. Bulteel*, 2 Crompt. & M. 339. 3 Dowl. Rep. 99. (a.) *Kensit v. Bulteel*, 4 Tyr. Rep. 59. S. C. *Forster v. Kirkwall*, 4 Dowl. Rep. 370. 11 Leg. Obs. 471. S. C.

motion: but the practice is otherwise in the Common Pleas^a; and, in the King's Bench, it seems to be necessary that there should be a separate rule for each^b. An order of *nisi prius*, cannot be amended by the court *in banc*, until it has been made a rule of court^c.

How impeached.

The order obtained on a summons is, however, subject to an *appeal*; and the validity of it may be impeached in two ways; either by moving the court to set it aside^d, or, if made in vacation, by applying, in the next term, to set aside the proceedings that have been had under it^e. The parties applying to the court to set aside an order made by a judge at chambers, may use the same *affidavits* as were before such judge, when he made the order^f. And on moving to set it aside, an *affidavit* stating the substance of the order is, it seems, sufficient^g. The application, however, for setting aside a judge's order should be made early, so as to prevent the parties from incurring unnecessary expense^h: and where it had been deferred from the month of *October* till *January* following, it was holden to be too lateⁱ. So, after an order of a judge at chambers has been made a rule of court, it is too late to object, in answer to a rule calling upon the party to pay money in pursuance of such order, that the judge had no power to make it^k. But an application to set aside a judge's order should be made to the full court^l: and such an application, made on the first day of term, to set aside the order, on the ground of the irregularity of the *affidavit* on which the defendant was held to bail, and to set aside a writ of *detainer* lodged at the gaol, being *eight days* after it was so lodged, was holden to be in time^l. In order to *rescind* a judge's order, it does not seem to be necessary to make it a rule of court^m; and no costs are allowed on rescinding itⁿ.

^a *Filcher (or Fitcher) v. Woods*, 4 Dowl. Rep. 329. 11 Leg. Obs. 310. S. C.

^b *Hinchliffe (or Hunchliffe) v. Jones*, 4 Dowl. Rep. 86. 1 Har. & W. 337. 10 Leg. Obs. 475. S. C.

^c *Cranch v. Tregoning*, 13 Leg. Obs. 141. *per Littledale, J.*

^d *James v. Kirk*, 1 Chit. R. 246. *Pewtress v. Harvey*, 1 Barn. & Ad. 154. *Roe d. Durant v. Moore*, 4 Moore & P. 761. 7 Bing. 124. 1 Dowl. Rep. 203. S. C.

^e *Per Ld. Mansfield, Ch. J. in Rex v. Wilkes*, 4 Bur. 2569.

^f *Pickford v. Ewington*, 1 Tyr. & G. 29. 1 Gale, 357. 4 Dowl. Rep. 453. 12 Leg. Obs. 61, 2. S. C.

^g *Shirley v. Jacobs*, 1 Scott, 67. 3 Dowl. Rep. 101. 9 Leg. Obs. 76, 7. S. C.

^h *Thompson v. Carter*, 3 Dowl. Rep. 657. 10 Leg. Obs. 173. S. C.

ⁱ *Granby v. Frowd*, 11 Leg. Obs. 213.

^k *Wilson v. Northorp*, 4 Dowl. Rep. 441. 12 Leg. Obs. 75. S. C.

^l *Johnson v. Kennedy*, 4 Dowl. Rep. 345. 2 Scott, 410. 11 Leg. Obs. 261, 2. S. C.

^m *Spicer v. Todd*, 2 Crompt. & J. 165. 2 Tyr. Rep. 172. 1 Dowl. Rep. 306. S. C.; but see *Hawes v. Johnson*, 1 Younge & J. 12, 13. *semb contra*.

ⁿ *Hargrave v. Holden*, 3 Dowl. Rep. 176. *per Parke, B.*

CHAP. XX.

Of SETTING ASIDE, and STAYING PROCEEDINGS; and of PROCEEDINGS on the INTERPLEADER ACT.

IN the present Chapter it is intended to state the general rules of court, and recent decisions, on motions or applications to set aside proceedings for irregularity; and to stay them, when the action is brought without proper authority, against bail pending error, or until security be given for the payment of costs; and to notice such of the proceedings on the *interpleader act*^a, as relate to the property in money or goods, where claims are made by different parties, one of whom has brought an action against the person in possession of them, and the defendant does not claim any interest therein.

An *irregularity* is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists, either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner^b: and, in general, it is either in *mesne* process, or the proceedings thereon before judgment, or in the judgment or execution^b. The distinction between *void* and *irregular* process, and the time and mode of setting it aside when irregular, having been treated of in a former chapter^c, it may here be proper to notice what relates to irregularity in subsequent proceedings.

The application to set aside proceedings for irregularity should be made as early as possible, or, as it is commonly said, in the first instance^d: for when there has been any irregularity, if the opposite party overlook it, and take subsequent steps in the cause, he cannot afterwards revert back, and object to it^e. And accordingly, by a

^a 1 & 2 W. IV. c. 58. § 1.

^b Tidd *Prac.* 9 Ed. 512.

^c Chap. VIII. p. 104, &c.

^d *Petrie v. White*, 3 Durnf. & E. 7.
D'Argent v. Vivant, 1 East, 335. *Steele v. Morgan*, 8 Dowl. & R. 450. *Warren v. Cross*, 9 Price, 637.

^e See cases referred to in Tidd *Prac.* 9

Ed. 513. (c.) and the following cases since determined. *Anon.* 1 Leg. Obs. 63. *per Littledale, J.* *Selby v. Goodman*, 5 Leg. Obs. 239. *per Patteson, J.* *K. B. Hamilton v. Jones*, 4 Moore & P. 456. *C. P. Millingen v. Truss*, 1 Price, N. R. 59. *Reeves v. Hucker, id.* 137. 2 Crompt. & J. 44, 5. 2 Tyr. Rep. 161. S. C. Routledge

How treated of.

Irregularity, what.

In mesne process, or subsequent proceedings.

Application to set aside proceedings for irregularity, when made.

By R. H. 2 W. IV. reg. I. § 33.

Decisions there-
on.

general rule of all the courts ^a, "no application to set aside proceedings for irregularity shall be allowed, unless made within a reasonable time: nor if the party applying has taken a fresh step, after knowledge of the irregularity." On this rule it has been decided, that where the arrest was on the 22d day of *May*, it was too late, on the 4th of *June*, to obtain the defendant's discharge, on the ground of a defect in the *affidavit* to hold to bail; the sheriff having in the mean time been ruled to return the writ, and mark his return ^b: And in one case ^c, where an intermediate step had been taken, a motion to set aside the declaration and subsequent proceedings for irregularity, was holden to be too late, after a lapse of *seven* days. So, where notice of inquiry was given on the 4th for the 12th, on which day a motion was made to set aside the declaration, on the ground of its being improperly filed instead of being delivered, and the judgment signed thereon, the application was holden to be too late ^d. The rule is said to be, that the party ought to come in *eight* days after notice ^e: and where there appears to have been a delay of more than *eight* days, before moving to set aside proceedings for irregularity, the defendant must clearly explain the delay, otherwise the presumption will be against him ^e. Bail, knowing of an agreement to give time, must apply for relief immediately on being served with process ^f: and an application to set aside a judgment by default, on an *affidavit* of merits, must be made in reasonable time ^g. Where there had been no intermediate step, however, it was holden not to be too late on the 25th of *November*, to take advantage of an irregularity in declaring too soon, which had

(*or* Rutledge) *v.* Giles, 2 Crompt. & J. 168. 2 Tyr. Rep. 169. S. C. Fisher *v.* Begrez, 1 Dowl. Rep. 588. 5 Leg. Obs. 159. S. C. Cook (*or* Cooke) *v.* Allen, 1 Crompt. & M. 350. 3 Tyr. Rep. 378. 1 Dowl. Rep. 676. 5 Leg. Obs. 481. S. C. Rutty *v.* Auber (*or* Arber), 3 Tyr. Rep. 591. 2 Dowl. Rep. 36. S. C. Fynn (*or* Fyson) *v.* Kemp, 2 Dowl. Rep. 620. 4 Tyr. Rep. 990. 8 Leg. Obs. 491. S. C. Tyler *v.* Green, 3 Dowl. Rep. 439. Morgan *v.* Davies, (*or* Bayliss), 1 Scott, 93. 3 Dowl. Rep. 117. S. C.

^a R. H. 2 W. IV. reg. I. § 33. 3 Barn. & Ad. 378. 8 Bing. 292, 3. 2 Crompt. & J. 177.

^b Firley *v.* Rallett, 2 Dowl. Rep. 708. *per* Parke, B.; and see Fownes *v.* Stokes, 4 Dowl. Rep. 125. 2 Scott, 205. S. C.

^c Fynn (*or* Fyson) *v.* Kemp, 2 Dowl. Rep. 620. 8 Leg. Obs. 491. S. C. *per* Parke, B.

^d Scott *v.* Cogger, 3 Dowl. Rep. 212. 9 Leg. Obs. 237. S. C. *per* Gurney, B.; and see Lewis *v.* Davison, 1 Crompt. M. & R. 655. 5 Tyr. Rep. 198. 3 Dowl. Rep. 272. S. C. Lewis *v.* Browne, 3 Dowl. Rep. 700. 10 Leg. Obs. 253. S. C. Roberts *v.* Cuttill, 4 Dowl. Rep. 204. 10 Leg. Obs. 380. S. C. Hinton *v.* Stevens, 4 Dowl. Rep. 283. 1 Har. & W. 521. S. C.

^e Herbert *v.* Darley, 4 Dowl. Rep. 726.; but see Hinton *v.* Stevens, 4 Dowl. Rep. 283. 1 Har. & W. 521. S. C.

^f Vernon *v.* Turley, 4 Dowl. Rep. 660. 1 Meeson & W. 316. 1 Tyr. & G. 421. S. C.

^g Fife *v.* Bruere, 4 Dowl. Rep. 329. 1 Hodges, 317. 11 Leg. Obs. 310. S. C.

occurred on the 7th^a. And a motion to set aside an interlocutory judgment for irregularity, which was signed because a plea was pleaded in the name of a person who was not an attorney, was holden to be in time on the 23d, the day of executing the writ of inquiry, though the notice of executing it was served on the 15th of May^b.

An irregularity, however, may be *waived*: And if the plaintiff, at the defendant's request, accept, without opposition, bail named by the defendant, the latter cannot afterwards move to discharge the bail, on the ground of a defect in the *affidavit* of debt^c. But appearing to oppose a rule, does not waive an objection to the form of the *affidavit* upon which it was obtained, such as the omission of the christian name of one of the parties, in the title of the cause^d. So, an irregularity is not waived by agreeing to terms, where the party is under a misapprehension, occasioned by the mistake of the judge in point of law^e. And there can be no waiver, unless with a knowledge of the irregularity complained of^f.

Waiver of irregularity.

In the Common Pleas there is a rule^g, similar to a former one in the King's Bench^h, that "in future, where a rule to shew cause is obtained, for the purpose of setting aside an annuity or annuities, the several objections thereto, intended to be insisted upon by the counsel, at the time of making such rule absolute, shall be stated in the said rule to shew cause."

Rule nisi, for setting aside annuity, must state the objections thereto.

When the action is brought by an attorney, without proper authority, the courts will stay the proceedings; for otherwise the de-

Staying proceedings, when

^a *Fish v. Palmer*, 2 Dowl. Rep. 460. 8 Leg. Obs. 301. S. C. *per Parke, J.*; and see *Smith v. Pennell*, 2 Dowl. Rep. 654. *per Parke, B.*

^b *Hill v. Mills*, 2 Dowl. Rep. 696; and see further, as to setting aside proceedings in general for irregularity, *Tidd Prac.* 9 Ed. 512, &c. And as to setting them aside for irregularity of process, *id.* 160, 61. *Ante*, 104, &c.

^c *Mammatt v. Mathew*, 10 Bing. 506. 4 Moore & S. 356. 2 Dowl. & R. 797. S. C.

^d *Barham v. Lee*, 4 Moore & S. 327. 2 Dowl. Rep. 779. S. C.; and see *Hanson v. Shackleton*, 4 Dowl. Rep. 48. 1 Har. & W. 342. S. C. 10 Leg. Obs. 476. S. C. *Ante*, 104.

^e *Whalley v. Barnet*, 1 Dowl. Rep. 607. 3 Tyr. Rep. 239. 5 Leg. Obs. 305. S. C.; and see *Woodcock v. Kilby*, 1 Meeson & W. 41. 1 Tyr. & G. 301. 4 Dowl. Rep. 730. 12 Leg. Obs. 197. S. C.

^f *Cox v. Tullock*, 2 Dowl. Rep. 47. *Blackburn v. Peat*, 2 Crompt. & M. 244. 4 Tyr. Rep. 38. 2 Dowl. Rep. 293. S. C.; and see *Fynn (or Fyson) v. Kemp*, 2 Dowl. Rep. 620. 4 Tyr. Rep. 990. 8 Leg. Obs. 491. S. C. *Tidd Prac.* 9 Ed. 513, 14.

^g R. M. 10 Geo. IV. C. P. 3 Moore & P. 762. 6 Bing. 347, 8.

^h R. T. 42 Geo. III. K. B. 2 East, 569.; and see *Tidd Prac.* 9 Ed. 527.

action is brought
without proper
authority.

defendant might be twice charged^a. So, where an action was brought against an *agent* for prize money, the court of King's Bench set aside the proceedings, with costs to be paid by the attorney, because the letter of attorney from the plaintiff, to receive the prize money, was not duly attested, pursuant to the statute 20 Geo. II. c. 24. § 6.^b And, in the Common Pleas, where claims were made on a prize agent, by several persons for prize money due to a sailor, the defendant was permitted, as a public officer, to pay the money into court, for the benefit of the claimant who should prove his authority

By partners, and
assignees.

to receive it^c. One of several *partners* has a right to use the name of the firm, in bringing an action; and if the other partner object, he has a right to be indemnified against the costs^d. So, an *assignee* of a debt has a right to use the assignor's name, in suing for it; and it is a sufficient authority for the attorney, if he be instructed by the former to commence proceedings^e. Where the assignee of an insolvent debtor had sued in the names of trustees for the insolvent, after having offered them an indemnity, but without their consent, and a judge at chambers had set aside the proceedings, the court of Exchequer stayed the judge's order and proceedings, till the trustees were indemnified^f. And where one of several plaintiffs dissented from bringing an action of *replevin*, the court would not interpose, by striking out his name, unless upon a suggestion of fraud^g.

Baron and feme.

Where an action was brought in the names of husband and wife, without the authority of the husband, the court, on application, ordered proceedings to be stayed, until an indemnity was given to the husband^h. And where the plaintiff had hired a house of the defendant, representing herself at the time to be a *feme covert*, and, upon the faith of the like representation, had obtained goods from various tradesmen, the court held that her assertion that she was a *feme*

^a Robson v. Eaton, 1 Durnf. & E. 62. 1 Chit. Rep. 193. (a.); and see Lambert v. Soares, 1 Price N. R. 107. Doe d. Davies v. Eyton, 3 Barn. & Ad. 785. Souter v. Watts, 2 Dowl. Rep. 263.; but see 1 Chit. R. 193. (b.) Wright v. Selby, 1 Price N. R. 107, 8. Mudry v. Newman, 1 Crompt. M. & R. 402. 4 Tyr. Rep. 1023. 2 Dowl. Rep. 695. S. C.

^b O'Hara v. Innes, M. 27 Geo. III. K. B.; and see the statutes 22 Geo. III. c. 63. § 1, 2. 32 Geo. III. c. 34. § 1, 2. 55 Geo. III. c. 60. Macdonald v. Pasley, 1 Bos. & P. 161. Man. Ex. Pr. 407.

^c Edwards v. Minett, 1 Taunt. 166.

^d Whitehead v. Hughes, 2 Dowl. Rep. 258. 2 Crompt. & M. 318. 4 Tyr. Rep. 92. S. C.

^e Pickford v. Ewington, 4 Dowl. Rep. 453. 12 Leg. Obs. 61, 2. S. C.

^f Spicer v. Todd, 2 Crompt. & J. 165. 2 Tyr. Rep. 172. 1 Dowl. Rep. 306. S. C.

^g Emery v. Mucklow, 10 Bing. 23. 3 Moore & S. 384. 2 Dowl. Rep. 735. 6 Leg. Obs. 493. S. C.

^h Morgan v. Thomas, 2 Dowl. Rep. 332. 2 Crompt. & M. 388. S. C. Harrison v. Almond, 4 Dowl. Rep. 321. 1 Har. & W. 519. 11 Leg. Obs. 165. S. C.

covert, estopped her from suing as a *feme sole*, in respect of a trespass committed by the defendant, under colour of a distress for rent ^a. But, in an action against husband and wife, for a debt incurred by the wife *dum sola*, the court refused, at the instance of the husband, to set aside an appearance entered for both; it appearing that the wife had given instructions to the attorney ^b. So, where a *feme covert* living apart from her husband, under a sentence of separation, with alimony allowed *pendente lite*, in the ecclesiastical court, brought *trespass*, in her husband's name, for breaking and entering her house, and taking her goods, the court of King's Bench refused, on the application of the defendants, to set aside the proceedings; though supported by an *affidavit* of the husband, that the action was brought without his authority ^c. And where a plaintiff had been delirious, and on apparently recovering he brought an action against his bankers, to recover money belonging to him in their hands, the court would not oblige him to give an indemnity to the bankers, on payment by them to him of the sum for which the action was brought ^d.

Lunatic.

When error was not brought till it was too late for the bail to surrender, the court of King's Bench, in one case ^e, would not stay the proceedings: but, in a subsequent case ^f, the proceedings were stayed; the bail undertaking to pay the condemnation money, and the costs in *scire facias*, in four days after affirmance. This point, however, is now settled by a general rule of all the courts ^g, by which it is ordered, that "to entitle bail to a stay of proceedings, pending a writ of error, the application must be made before the time to surrender is out."

Application to stay proceedings against bail, pending error.

It was not formerly usual to require security for costs, where the plaintiff resided abroad, except in *ejectment*, or in actions *qui tam* ^h; for it was considered that such a proceeding might have affected trade, by excluding foreigners from our courts, and would be a means of clogging the course of justice: But now, although a plaintiff is not compellable to give security for costs, merely as a foreigner, if he reside in this country, yet, whether he be a foreigner

Security for costs.

When required, in general.

^a Langford v. Foot, 2 Moore & S. 349; per Patteson, J.

and see Mace v. Caddell, Cowp. 232.

^b Williams v. Smith, 1 Dowl. Rep. 632.

5 Leg. Obs. 497, 8. S. C. Excheq.

^c Chambers v. Donaldson, 9 East, 471;

and see ——— v. Smith, 2 Chit. R. 392.

Brown v. Wright, 1 Dowl. Rep. 95. 2

Leg. Obs. 412. S. C. per Patteson, J.

^d Hope v. Watson, 2 Leg. Obs. 413.

^e Everett v. Gery, 1 Str. 443.; and see

Tidd Prac. 9 Ed. 533.

^f Ritson v. Francis, 2 Str. 877.

^g R. H. 2 W. IV. reg. I. § 84. 3

Barn. & Ad. 386. 8 Bing. 300. 2 Crompt.

& J. 192.

^h Tidd Prac. 9 Ed. 534, and the au-

thorities there cited.

When plaintiff resides in *Scotland* or *Ireland*, &c.

In actions by seamen.

By persons going abroad for temporary purpose.

or native, if he reside abroad, out of the reach of the process of the court, the proceedings may, in general, be stayed, on a proper *affidavit*^a, till his return, or security be given for the payment of costs.

When the plaintiff resides in *Scotland*^b, or *Ireland*^c, proceedings may be stayed, until security be given for the payment of costs. So, it has been holden that a plaintiff, a *Scotchman*, not actually domiciled in this country, but only occasionally residing here, is bound to give such security^d. And, in an action brought by an *Irish* joint stock company, incorporated by act of parliament, the proceedings were ordered to be stayed, until the company gave security for costs; it appearing that they had no available property in *England*^e. So, in an action brought upon a bond, in the name of an assignee resident abroad, for the benefit of an assignee in this country, the defendant may claim security from the nominal plaintiff^f: the assignee's written undertaking is not sufficient^g. The rule requiring such security, however, has been relaxed by the court of Common Pleas, in favour of foreign seamen, serving on board English ships^h; or being in the habit of navigating them to and from the ports in this countryⁱ. But where it appeared that the plaintiff, who sued as a pauper, was a seafaring man, and had sailed as third officer on board a vessel to *India*; that he had only thirty shillings a-week, and a portion of that sum was advanced him for slops and necessities; and that he would not return for *eighteen months*; the judge, though he would not dispauper the plaintiff, thought that as he would be absent so long, the rule ought to be made absolute, for his either finding security for costs, or for a stay of proceedings until he should return from *India*^j. If the plaintiff be a native of *England*, and go abroad for a mere temporary purpose, the court will not compel him to give security for costs^k.

^a Append. to Tidd *Prac.* 9 Ed. 180.

^b *M'Lean v. Austin*, M. 36 Geo. III. K. B. *Sheriff v. Farquharson*, M. 37 Geo. III. K. B. *Baxter v. Morgan*, 6 Taunt. 379. 2 Marsh. 80. S. C.; but see *Maxwell v. Mayer*, 2 Bur. 1026.

^c *Fitzgerald v. Whitmore*, 1 Durnf. & E. 362. *Still v. M'Iver*, M. 36 Geo. III. K. B. *Anon.* 2 Chit. Rep. 151. *Mahon v. Martinez*, 4 Moore, 356. *Lewis v. Owens*, 5 Barn. & Ald. 265. *Moloney v. Smith*, M'Clel. & Y. 213.

^d *Naylor v. Joseph*, 10 Moore, 522.

^e *Limerick and Waterford Railway*

Company v. Fraser, 1 Moore & P. 23. 4 Bing. 394. S. C.

^f *Youde v. Youde*, 3 Ad. & E. 311.

^g *Henschen v. Garves*, 2 H. Blac. 383. *Jacobs v. Stevenson*, 1 Bos. & P. 96.

^h *Nelson v. Ogle*, 2 Taunt. 253; and see *Durell v. Mattheson*, 3 Moore, 338. Taunt. 711. S. C. *Kasten v. Plaw*, 1 Moore & P. 30.

ⁱ *Foss v. Wagner*, 2 Dowl. Rep. 499. 8 Leg. Obs. 138. S. C. *per Taunton*, J.

^j *Anon.* 2 Chit. Rep. 152; and see *Colv. v. Beale*, 7 Moore, 613. *Taylor v. Fraser*, 2 Dowl. Rep. 622. 9 Leg. Obs. 44.

And where the plaintiff was an English officer, serving in *South America* ^a, the court of Common Pleas refused to grant a rule, compelling him to give such security. So, a commissioner of the *Ionian* islands, serving his majesty abroad, and having also a residence and property in this country, is not compellable to give it ^b. But the cases in which a plaintiff is excused from giving security for costs, on the ground of temporary absence from *England*, are said to be those in which he has left this country after the commencement of the action ^c: and therefore, if the plaintiff, after leaving this country, commence an action, he will be compelled to find such security ^c. In the Exchequer, the plaintiff being resident in a foreign country, out of the jurisdiction, may be restrained from proceeding, until he give security for costs ^d: But security cannot be required, in that court, from a *peer*, though residing abroad ^e. So, the court will not make an order to stay proceedings, until security be given for costs, upon the ground of the plaintiff being about to leave the country ^f. And where there is no doubt as to the plaintiff's suing in his own right, and it does not appear that he is out of the kingdom, the court will not require him to give security for costs, or disclose his place of residence ^g.

An *infant* plaintiff cannot, we have seen ^h, be compelled to give security for costs, on the ground of the insolvency of his *prochein ami* ⁱ: But in a late case ^k, where an infant sued by *guardian*, who was sworn to be in insolvent circumstances, the court of Common Pleas required the guardian to give such security, or that his appointment should be revoked. Where the action is brought, or proceeded in by a *bankrupt*, for the benefit of his assignees, the court will stay the

By infant.

By bankrupt.

S. C. *per Vaughan*, B. *Boustead v. Scott*, 2 Dowl. Rep. 622. *per Gurney*, B. *Frodsham v. Myers*, 4 Dowl. Rep. 280. 1 Har. & W. 526. 11 Leg. Obs. 134. S. C.

^a *O'Langhla (or O'Lawler) v. MacDonald*, 3 Moore, 77. 8 Taunt. 786. S. C.

^b *Ld. Nugent v. Harcourt*, 2 Dowl. Rep. 578. *per Patteson*, J.

^c *Wells v. Barton*, 2 Dowl. Rep. 160. *per Patteson*, J.; and see *Foss v. Wagner*, 2 Dowl. Rep. 499. 6 Leg. Obs. 138. S. C. *Tidd Prac.* 9 Ed. 534, 5.

^d *De Marneffe v. Jackson*, 13 Price, 603.; and see *Drury v. Johnson*, *id.* 469.; but see *Beckman v. Legrainge*, 2 Anstr. 359. *semb. contra.*

^e *Earl Ferrars v. Robins*, 2 Dowl. Rep. 636. 8 Leg. Obs. 59. S. C. Exchecq.; and see *Ld. Nugent v. Harcourt*, 2 Dowl. Rep. 578. *per Patteson*, J.; but see *Ld. Aldborough v. Burton*, 9 Leg. Obs. 171. in Chan. *contra.*

^f *Willis v. Garbutt*, 1 Younge & J. 511.

^g *Lloyd v. Davis, (or Davies)*, 1 Tyr. Rep. 533. 1 Price N. R. 11. S. C.

^h *Ante*, 62.

ⁱ Anon. 1 Marsh. 4. *Yarworth v. Mitchel*, 2 Dowl. & R. 423.; and see Anon. 2 Chit. R. 359.

^k *Mann v. Berthen*, 4 Moore & P. 215. *Ante*, 62.

By insolvent
debtor.

In *qui tam*
action.

proceedings, until security be given for the payment of costs ^a: but it is otherwise where an uncertificated bankrupt sues for his own benefit, as for the produce of his earnings since the bankruptcy ^b: And where a plaintiff becomes *bankrupt* in the middle of a cause, the assignees, if they proceed with the action, must give security for all the costs ^c; and the defendant may apply for such security, at any time before a fresh step in the cause is taken ^c. Where a defendant, however, obtains security for costs, on the ground that the plaintiff has become bankrupt, and that the action is continued for the benefit of his assignees, he must undertake not to plead the bankruptcy ^d. If an *insolvent debtor* proceed with an action, after executing his assignment, although no assignees are appointed, the court will compel him to find security for costs ^e. So, where the plaintiff had been discharged under the *insolvent* act, after issue joined, and before notice of trial given, the court of King's Bench stayed the proceedings, until the assignee, or some creditor of the plaintiff, should give such security ^f. But where an insolvent brought an action, to recover property acquired by him after his assignment, no order having been made by the *insolvent* court, to enable the assignees to issue execution against the property, the court of Exchequer refused to require security from the plaintiff ^g. The court will not compel a plaintiff in a *qui tam* action, to give security for costs; though he is sworn to be a pauper, and has brought a great number of actions by the same attorney ^h. And they refused to grant a rule, calling upon the defendant in *replevin*, to find such security, although it was sworn that neither the defendant, nor the broker, were able to pay them, and the defendant had taken the benefit of

^a Webb v. Ward, 7 Durnf. & E. 296. Saunders v. Purse, H. 35 Geo. III. K. B. Cohen v. Bell, T. 44 Geo. III. K. B. Bass v. Clive, 3 Maule & S. 283. Robertson v. Arnold, H. 58 Geo. III. K. B. Hancock v. Smith, 2 Chit. R. 150. Walkinshaw v. Marshall, 4 Tyr. Rep. 993.

^b Cohen v. Bell, T. 44 Geo. III. K. B.; and see Webb v. Ward, 7 Durnf. & E. 297. M'Connell v. Johnston, 1 East, 431. Anon. 2 Taunt. 61. Morgan v. Evans, 7 Moore, 345.

^c Mason v. Polhill, 2 Dowl. Rep. 61. 1 Crompt. & M. 620. 3 Tyr. Rep. 596. S. C.

^d Manley v. Mayne, 3 Man. & R. 381;

and see Minchin v. Hart, 1 Chit. Rep. 215. Tidd Prac. 9 Ed. 536.

^e Doyle v. Anderson, 2 Dowl. Rep. 596, per Patteson, J.

^f Heaford v. Knight, 2 Barn. & C. 579. 4 Dowl. & R. 81. S. C.

^g Clapworthy v. Collier, 2 Crompt. & J. 631; and see Snow v. Townsend, 6 Taunt. 123. 1 Moore, 477. S. C. Tidd Prac. 9 Ed. 536.

^h Gregory v. Elvidge, (or Elridge,) 2 Dowl. Rep. 259. 2 Crompt. & M. 336. 4 Tyr. Rep. 235. S. C.; and see Shindler v. Roberts, Barnes, 126. Golding v. Barlow, Cowp. 24. Field v. Carron, 2 H. Blac. 27.

the insolvent act^a. It is a general rule, that proceedings shall not be stayed in *ejectment*, where the lessor of the plaintiff is known, of full age, and resident in this country^b. And where one of two lessors of the plaintiff is abroad, the defendant is not entitled to security for his costs^c. But a party residing abroad may, upon being admitted to defend an *ejectment* as landlord, be required to give such security^d. The court of King's Bench will not stay the proceedings on a *quo warranto* information, until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested^e. But where it appeared that the person applying for a *quo warranto*, was in low and indigent circumstances, and that there was strong ground of suspicion that he was applying, not on his own account, or at his own expense, but in collusion with a stranger, the court required such security to be given^f.

The motion for a rule to compel security for costs, should be made in an early stage of the proceedings, or as soon as the defendant can reasonably do it, after knowledge of the fact of the plaintiff's residence abroad^g. In the King's Bench and Exchequer, however, the application might formerly have been made at any time before *plea* pleaded^h; though an order for time to plead had been previously obtainedⁱ: but it was not allowed, in either of these courts, after *issue* joined^k. In the Common Pleas, the secondary, in one case^l, certified that the motion, requiring an infant plaintiff to give security for costs, might be made after *issue* joined; but, in a subsequent

In ejectment.

In quo warranto.

Motion for, when and how made.

^a Hiskett (or Heckett) v. Biddle, 3 Dowl. Rep. 634. 1 Hodges, 119. S. C.

^b Doe d. Selby v. Alston, 1 Durnf. & E. 491; and see Henschen v. Garves, 2 H. Blac. 383. Jacobs v. Stevenson, 1 Bos. & P. 96. Maria v. Hall, 2 Bos. & P. 236. Steel v. Allan, *id.* 437. Ad. Eject. 2 Ed. 315, 16.

^c Doe d. Bawden v. Roe, 1 Hodges, 315.

^d Doe d. Hudson v. Jameson, 4 Man. & R. 570.

^e Rex v. Wynne, 2 Maule & S. 346; and see 2 Chit. Rep. 369 (a). Tidd *Prac.* 9 Ed. 535, 6.

^f Rex v. Wakelin, 1 Barn. & Ad. 50; and see Rex v. Day, and Rex v. Patteson, 1 Dowl. Rep. 32. 2 Leg. Obs. 12. S. C. *per* Patteson, J.

^g Anon. 2 Chit. R. 151. (a.)

^h Anon. 2 Chit. R. 151. K. B. Wilson (or Minchin) v. Minchin, 2 Crompt. & J. 87. 2 Tyr. Rep. 166. 1 Price N. R. 159. 1 Dowl. Rep. 299. S. C. Excheq.

ⁱ Fry v. Wills, 3 Dowl. Rep. 6. 9 Leg. Obs. 205. S. C. K. B. Wilson (or Minchin) v. Minchin, 2 Crompt. & J. 87. 2 Tyr. Rep. 166. 1 Price N. R. 159. 1 Dowl. Rep. 299. S. C. Excheq.

^k Walters v. Frythall, 5 East, 338. Anon. 2 Chit. R. 359. Du Belloir v. Ld. Waterpark, 1 Dowl. & R. 348. (a.) Duncan v. Stint, 5 Barn. & Ald. 702. 1 Dowl. & R. 348. S. C. K. B. Anon. 5 Price, 610. Moloney v. Smith, M'Clell. & Y. 213. Excheq.

^l Anon. 1 Marsh. 4, 5.

case^a, it was certified that such motion must be made before plea pleaded: And now, by a general rule of all the courts^b, "an application to compel the plaintiff to give security for costs, must, in ordinary cases, be made before issue joined." Under this rule, an application for security for costs may be granted after plea pleaded^c: And, in the King's Bench, where the plaintiff resides abroad, the court has a discretionary power to require security for costs, notwithstanding the defendant has proceeded in the cause, after he knew that the plaintiff resided abroad^c. In the Exchequer, it has been decided, that a defendant who moves for security for costs need not state the stage of the proceedings: it rests with the plaintiff to shew that the application is too late^d. And, in that court, a motion for security for costs, on the ground of the plaintiff's absence from *England*, must regularly be made before issue joined, and as soon as the defendant knows the plaintiff to have left the country, as well as before he takes any further step^e: If made after issue joined, the court must be satisfied that the defendant did not, before that step in the cause, know of the plaintiff's absence^e. When security for costs has been once given, the court will not compel a plaintiff to give fresh security, where the first has proved insufficient^f. And after trial, and a jury discharged from giving a verdict, it is too late to move for security for costs of another trial, where the defendant knew that the plaintiff left *England* after issue joined, and before the first trial^g. The court will not appoint any fixed time, within which the plaintiff is to give security for costs^g.

Proceedings on
interpleader act.

It may here be proper to notice, as connected with the subject of staying proceedings, the provisions of the statute 1 & 2 W. IV. c. 58, to enable courts of law to give relief against adverse claims, made upon persons having no interest in the subject of such claims. These provisions are of two kinds; first, such as relate to the property in money or goods, where claims are made by different parties,

^a *Kasten v. Plaw*, 1 Moore & P. 30; and see *Tidd Prac.* 9 Ed. 537.

^b R. H. 2 W. IV. reg. I. § 98. 3 Barn. & Ad. 389. 8 Bing. 303. 2 Crompt. & J. 196.

^c *Fletcher v. Lew*, 5 Nev. & M. 351. 1 Har. & W. 430. 3 Ad. & E. 551. S. C.

^d *Jones v. Jones*, 2 Crompt. & J. 307. 2 Tyr. Rep. 216. 1 Dowl. Rep. 313. S. C.; but see *Luzalletti v. Powell*, 1 Marsh. 376.

C. P. *contra*.

^e *Wainwright v. Bland*, 1 Tyr. & G. 37. 2 Crompt. M. & R. 740. 1 Gale, 333. 4 Dowl. Rep. 547. S. C.

^f *Jones v. Jacobs*, 2 Dowl. Rep. 442. 7 Leg. Obs. 429. S. C. *per Parke, J.*; and see *Alvon v. Furnival*, 2 Crompt. & M. 555. 4 Tyr. Rep. 370. S. C.

^g *Broughton v. Jeremy*, 1 Har. & W. 525.

one of whom has brought an action against the person in possession of them, and the defendant does not claim any interest therein; and secondly, for the relief of sheriffs and other officers, in execution of process against goods and chattels. The former will be treated of in this, and the latter in a subsequent Chapter^a.

Before the making of the above statute, it often happened, that a person sued at law for the recovery of money or goods, wherein he had no interest, and which were also claimed of him by some third party, had no means of relieving himself from such adverse claims, but by a suit in equity against the plaintiff and such third party, usually called a bill of *Interpleader*, which was attended with expense and delay^b; for remedy whereof, it is enacted by the above statute, that "upon application made by or on the behalf of any defendant, sued in any of his majesty's courts of law at *Westminster*, "or in the court of Common Pleas of the county palatine of *Lancaster*, or the court of pleas in the county palatine of *Durham*, in any "action of *assumpsit*, *debt*, *detinue*, or *trover*, such application being "made after declaration and before plea, by *affidavit*^c or otherwise, "shewing that such defendant does not claim any interest in the "subject matter of the suit, but that the right thereto is claimed, or "supposed to belong to some third party, who has sued, or is expected to sue for the same, and that such defendant does not in "any manner collude with such third party, but is ready to bring "into court, or to pay or dispose of the subject matter of the action, "in such manner as the court, or any judge thereof, may order or "direct; it shall be lawful for the court, or any judge thereof, to "make rules^d, and orders^d, calling upon such third party to appear, and to state the nature and particulars of his claim, and "maintain or relinquish his claim; and upon such rule or order, to "hear the allegations as well of such third party as of the plaintiff, "and in the mean time to stay the proceedings in such action; and "finally, to order such third party to make himself defendant in "the same, or some other action, or to proceed to trial on one or "more *feigned* issue or issues^e; and also to direct which of the "parties shall be plaintiff or defendant on such trial; or, with the "consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims, and determine the

For relief
against adverse
claims.

Provisions of
act.

Adverse claims,
how tried and
determined.

^a Chap. XLI.

^b See the preamble to stat. 1 & 2 W. IV. c. 58. and 2 Rep. C. L. Com. 24, b. 76, 7.

^c Append. to Tidd *Sup.* 1833. p. 296.

^d For the form of a rule *nisi*, and summons to shew cause, on the above statute, see Append. to Tidd *Sup.* 1833. p. 297. 299.

^e *Id.* 297.

Judgment and decision of court, or judge, to be final.

" same, in a summary manner ^a; and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable ^b: and that the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them." ^c

If third party do not appear.

" That if such third party shall not appear, upon such rule or order, to maintain or relinquish his claim, being duly served there-with, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such order, between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable." ^d

Proviso, as to orders by a single judge.

" Provided always, that no order shall be made in pursuance of that act, by a single judge of the court of pleas of the said county palatine of *Durham*, who shall not also be a judge of one of the said courts at *Westminster*: and that every order to be made in pursuance of that act, by a single judge not sitting in open court, shall be liable to be rescinded or altered by the court, in like manner as other orders made by a single judge." ^e

Reference by single judge, to decision of court.

" Provided also, that if, upon application to a judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the court, it shall be lawful for him to refer the matter to the court; and thereupon the court shall and may hear and dispose of the same, in the same manner as if the proceeding had originally commenced by rule of court, instead of the order of a judge." ^f

Decisions on interpleader act.

This statute is confined to actions of *assumpsit*, *debt*, *detinue*, and *trover*: and therefore, where the declaration contained a count in *case*, as well as in *trover*, the court would not interfere: And the court cannot give relief to stakeholders, who are only threatened with proceedings: an action must be brought, and the

^b Append. to Tidd *Sup.* 1833. p. 299.

^b Stat. 1 & 2 W. IV. c. 58. § 1.

^c *Id.* § 2.

^d *Id.* § 3.

^e *Id.* § 4.

^f *Id.* § 5. There is also a clause in the act, (§ 7.) that all rules, orders, &c. made in

pursuance thereof, may be entered of record, &c., which will be noticed in Chap. XLI. when treating of the relief of sheriffs, and other officers, in the execution of process against goods and chattels.

^g *Lawrence v. Matthews*, 5 Dowl. Rep. 149. 12 Leg. Obs. 230. S. C.

plaintiff declare, before the court can interfere^a. It has also been decided, that a party who, by his own act, is placed in a situation to be sued, cannot call on the court to substitute another defendant in his stead^b: And the holder of title deeds cannot apply to the court, for protection against opposing claims^c. So, a rule for interpleading will not be granted, after a suit has been stayed by injunction^d. And a contested claim to a reward advertised for the apprehension of a felon, cannot be made the subject of a motion under the above act^e. A defendant who is sued for the recovery of property in his possession, in which he has no interest, but which is claimed by a third person, cannot apply to be relieved under the interpleader act, against the claims of the plaintiff and such third party, if he has an indemnity from the claimant^f. And the case of a wharfinger, who claims a lien on goods for wharfage, &c. which attaches only upon one of the parties by whom the goods are claimed, is not, it seems, within the meaning of the statute^g. But a lien attaching upon the goods in dispute, and which must be satisfied by whichever party ultimately turns out to be entitled to them, does not prevent the party who holds the goods from applying to the court for relief, under the above act^h. And where goods consigned to *A.* and warehoused at the *London* docks, were claimed by *B.*, and the dock company having required an indemnity of *A.*, the original consignee, before delivering them to him, *A.* refused, and brought an action of *trover*, with counts for special damage, for the detention: on motion by the company for relief, under the interpleader act, *B.* not appearing upon due notice, the court held that the claim of *B.* against the company was barred; but that *A.* ought not, by reason of the act, to be precluded from recovering for his special damage, if anyⁱ. Where an auctioneer has one action brought against him in the Common Pleas, and another in the King's Bench, by different claimants, for the same property, he must, in order to relieve himself under the Interpleader act, obtain rules in both courts^k: And if part of a sum claimed by the parties has been paid to one of them, before an adverse claim

^a *Parker v. Linnett*, 2 Dowl. Rep. 562.

¹ *Crompt. & M.* 73. S. C.

⁸ Leg. Obs. 398. S. C. *per Patteson, J.*

⁸ *Braddick v. Smith*, 2 Moore & S. 131.

^b *Belcher v. Smith*, 9 Bing. 82. 2 Moore & S. 184. S. C.

⁹ Bing. 84. S. C.; but see *Gladstone v. White*, 1 Hodges, 386.

^c *Smith v. Wheeler*, 1 Gale, 163.

^h *Cotter v. Bank of England*, 3 Moore & S. 180. 2 Dowl. Rep. 728. S. C.

^d *Arayne v. Lloyd*, 1 Bing. N. R. 720.

ⁱ *Lucas v. London Dock Company*, 4

1 Hodges, 166. 1 Scott, 609. S. C.

Barn. & Ad. 378.

^e *Grant v. Fry*, 4 Dowl. Rep. 135.

Collis v. Lee, 1 Hodges, 204.

^k *Allen v. Gilby*, 3 Dowl. Rep. 143.

^f *Tucker v. Morris*, 1 Dowl. Rep. 639.

made, the adverse claimant has a right to have the whole sum he claims paid into court, on the holder's applying for relief under the act^a.

Further decisions.

On an application to a judge at chambers, under the interpleader act, an order having been made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed, the court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained, since the hearing at chambers^b. The costs of the applicant, where he has acted *bond fide*, will, in the first instance, be directed to be paid out of the fund, or proceeds of the goods in dispute, to be repaid by the party ultimately unsuccessful^c. And where an issue has been directed by the court, to try the rights of contending parties to the property in question, and the intermediate party has paid money into court, to abide the event of the issue, the successful party cannot move to have the money paid out to him, until final judgment has been signed^d. In the Exchequer, a rule *nisi*, under the first section of the interpleader act, is no stay of proceedings, unless notice of the motion for that purpose has been given to the parties against whom it has been obtained^e. And although, it has been said, cause cannot be shewn at chambers against such a rule obtained by a sheriff, under the sixth section of the act^f, yet it may be so shewn, where the rule has been obtained under the first section^g.

^a Allen v. Gilby, 3 Dowl. Rep. 143.

^b Drake v. Brown, 2 Crompt. M. & R. 270.

^c Duear v. Mackintosh, 3 Moore & S. 174. 2 Dowl. Rep. 734. S. C. Cotter v. Bank of England, 3 Moore & S. 180. 2 Dowl. Rep. 728. S. C. Parker v. Linnett, 2 Dowl. Rep. 562. 8 Leg. Obs. 398. S. C. per Patteson, J. Agar v. Blethyn, 1 Tyr. & G. 160.

^d Cooper v. Lead Smelting Company, 2 Moore & S. 714. 810. 9 Bing. 634. 1 Dowl. Rep. 728. S. C. For the notice of

motion, and rules of court in this case, see Append. to Tidd Sup. 1833. p. 296, 7.

^e Smith v. Wheeler, 9 Leg. Obs. 318.

^f Shaw v. Roberts, 2 Dowl. Rep. 25. 6 Leg. Obs. 444, 5. S. C. Brackenbury v. Lawrie, 3 Dowl. Rep. 180. per Alderson, B.; but see Poweler v. Lock, 4 Nev. & M. 852, 3. per Ld. Denman, Ch. J. Beames v. Cross, 4 Dowl. Rep. 122. Hailey (or Haines) v. Disney, 1 Hodges, 189. 2 Scott, 183. S. C. contra.

^g Smith v. Wheeler, 1 Gale, 15. 3 Dowl. Rep. 431. 9 Leg. Obs. 318. S. C.

CHAP. XXI.

Of WARRANTS of ATTORNEY to CONFESS JUDGMENT, and ENTERING up JUDGMENT thereon; and of COMPOUNDING a PENAL ACTION.

THE security usually given by the defendant to the plaintiff, on compromising an action, and which is also frequently given when no action is depending, is a *warrant of attorney*; so called, from its authorizing the attorney or attornies, to whom it is directed, to appear for the defendant, and receive a declaration in an action to be brought against him, and thereupon to confess the same action, or suffer judgment therein to pass by default ^a, &c.

Warrant of attorney what, and why so called.

Every warrant of attorney should be given voluntarily, and for a good consideration: Therefore, if a warrant of attorney be obtained by fraud ^b, or misrepresentation ^c, or given for a corrupt and usurious consideration ^d, or for securing the payment of an annuity, which is void by the annuity act ^e, &c. or of a debt discharged by the insolvent debtors' act ^f, the courts will order it to be delivered up, and set aside the judgment and proceedings, if any, which have been had under it. The court of King's Bench has a summary jurisdiction over a warrant of attorney alleged to be fraudulent, on the application of any person interested in impeaching it ^g: and they will interfere, on the ground of fraud, at the instance of a third person, who is not a party to the warrant of attorney ^h. If the facts upon which the

Consideration for, and in what cases ordered to be delivered up.

For fraud.

^a Tidd *Prac.* 9 Ed. 545. Append. thereto, Chap. XXI. § 4. And for the form of a warrant of attorney to confess judgment in *ejectment*, see *id.* Chap. XLVI. § 59.

^b *Duncan v. Thomas*, Doug. 196. *Thomas v. Rhodes*, 3 Taunt. 478; and see *Jackson v. Davison*, 4 Barn. & Ald. 691. *Rogers v. Kingston*, 10 Moore, 97. 2 Bing. 441. S. C. *Kay v. Masters*, 1 Dowl. Rep. 86. 2 Leg. Obs. 396. S. C. *per Patteson, J.*

^c *Anon.* 2 Ken. 294.

^d *Cook v. Jones*, Cowp. 727. *Edmonson v. Popkin*, 1 Bos. & P. 270. *Roberts v. Goff*, 4 Barn. & Ald. 92. *Post*, 276.

^e Tidd *Prac.* 9 Ed. 521, 2. 525. *Post*, 277.

^f *Smith v. Alexander*, 5 Dowl. Rep. 13. 12 Leg. Obs. 212. S. C.

^g *Harrod v. Benton*, 2 Man. & R. 130. 8 Barn. & C. 217. S. C.

^h *Martin v. Martin*, 3 Barn. & Ad. 934.

alleged fraud depends, are clearly made out by *affidavit*, the court, upon motion, will set aside a warrant of attorney, judgment and execution, on the ground that they are fraudulent against creditors ^a: but when those facts are disputed, they will direct an issue to try the question of fraud ^a. And a warrant of attorney given to a particular creditor, by one who at the time intends to take the benefit of the insolvent debtors' act, is fraudulent and void against his assignees, as being a charge on property, or a transfer of it by assignment, within the 32d section of 7 Geo. IV. c. 57 ^b. But where a party gives a warrant of attorney to another without consideration, in order that the latter may protect the goods of the former from execution, and judgment and execution are signed and issued against good faith, a court of law, it is said, will not interpose ^c.

Usury.

If a judgment be founded on an *usurious* security, the court of King's Bench will set it aside, without compelling the defendant to repay the principal and interest ^d. But where *A.* at *B.*'s request, advanced him 200*l.* and took his warrant of attorney for payment as follows; 100*l.* at *Christmas* 1829, and 100*l.* at *Midsummer* 1830, if both should be then living, and 100*l.* at *Christmas* 1830, on the same condition; judgment being entered up for the last 100*l.* and a motion made to set it aside, as founded on an evidently usurious contract, the court held that this did not sufficiently appear, to warrant the interposition of the court ^e. So, where an annuity was granted for *four* lives, with a covenant on the part of the grantor, to insure the fourth life to the amount paid for the consideration, within *thirty* days after the decease of the three first, the court of Common Pleas refused to set aside the warrant of attorney, on the ground of usury ^f. And where securities had been acted on, and the money partly paid by the borrower, that court would not set aside a judgment and execution on the ground of usury, but upon the terms of the defendant's repaying the principal and legal interest ^g. It may here be proper to notice, that by the *Bank act* ^h, "no bill of exchange, or promissory note, made "payable at or within *three* months after the date thereof, or not "having more than *three* months to run, shall, by reason of any in-

^a Harrod v. Benton, 2 Man. & R. 130.
8 Barn. & C. 217. S. C.

^b Sharpe v. Thomas, 6 Bing. 416. 4 Moore & P. 87. S. C.; and see Herbert v. Wilcox, 6 Bing. 203. 3 Moore & P. 515. S. C.; but see Arnell v. Bean, 1 Moore & S. 151. 8 Bing. 87. S. C.

^c Dukes v. Saunders, 1 Dowl. Rep.

522. *per* Parke, J.

^d Roberts v. Goff, 4 Barn. & Ald. 92.

^e Flight v. Chaplin, 2 Barn. & Ad. 112; and see Ferguson v. Sprang, 3 Nev. & M. 665. 1 Ad. & E. 576. S. C.

^f *Ex parte* Nash, 4 Moore & P. 793.

^g Hindle v. O'Brien, 1 Taunt. 413.

^h 3 & 4 W. IV. c. 98. § 7.

"terest taken thereon or secured thereby, or any agreement to pay or receive, or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any such bill or note be affected, by reason of any statute or law in force for the prevention of usury." And a warrant of attorney given to secure the amount of an usurious bill at *three* months, which had been dishonoured at maturity, was holden to be protected by the act^a. Where a young man gave bills for the amount of a *gaming* debt, and when they were due, renewed them with the holder, and for the last bills when due, confessed a judgment by warrant of attorney, the court of Common Pleas would not set aside the judgment, unless he could affect the holders of the bills with notice, but permitted him to try that fact in an issue^b. Where a warrant of attorney has been given to confess a judgment, or judgment has been entered up thereon, for securing the payment of an *annuity*, the courts, in virtue of their general jurisdiction, will enter into the validity of the warrant of attorney, or judgment, upon motion; and if the provisions of the annuity acts have not been complied with, will vacate the warrant of attorney, or set aside the judgment^c.

Gaming debt.

On annuity acts.

If a warrant of attorney be given by an *infant*^d, or by one of several *executors*, to confess a judgment against all^e, the court will order it to be delivered up, &c.: And a joint warrant of attorney, to confess a judgment by an *infant* and another, may be vacated against the infant only^f. But in order to entitle the defendant to relief, on the ground of infancy, he must clearly shew that he was under age, at the time of giving the warrant of attorney^g. And a warrant of attorney under seal, executed by one person for himself and his

When given by infant, or by one of several executors.

By partner

^a Connop v. Yeates, (or Meaks,) 4 Nev. & M. 302. 2 Ad. & E. 326. S. C.

^b George v. Stanley, 4 Taunt. 683.

^c *Ex parte* Chester, 4 Durnf. & E. 694. Haynes v. Hare, 1 H. Blac. 659. Duke of Bolton v. Williams, 4 Bro. C. C. 310. 2 Ves. Jun. 138. S. C. Steadman v. Purchase, 6 Durnf. & E. 737. Van Braam v. Isaacs, 1 Bos. & P. 451. Garrick v. Williams, 3 Taunt. 540. Storton v. Tomlins, 10 Moore, 172. 2 Bing. 475. S. C.; and for decisions on the annuity acts, 17 Geo. III. c. 26. & 53 Geo. III. c. 141. see Cumberland v. Kelley, 3 Barn. & Ad. 602. Walford v. Marchant, 2 Barn. & Ad. 315. Frost v. Frost, 3

Barn. & Ad. 612. Davis v. Bryan, 9 Dowl. & R. 726.

^d Saunderson v. Marr, 1 H. Blac. 75. Chambers v. Burnett, T. 32 Geo. III. C. P. Imp. C. P. 7 Ed. 597. Storton v. Tomlins, 10 Moore, 172. 2 Bing. 475. S. C.

^e Elwell v. Quash, 1 Str. 20; and see 1 Rol. Abr. 929. pl. 5. Lepard v. Vernon, 2 Ves. & B. 51. 1 Chit. R. 708. *in notis*.

^f Motteux v. St. Aubin, 2 Blac. Rep. 1133. Wood v. Heath, 1 Chit. R. 708. *in notis*. Ashlin v. Langton, 4 Moore & S. 719.

^g Weaver v. Stokes, 1 Meeson & W. 203. 1 Tyr. & G. 512. 4 Dowl. Rep. 724. 12 Leg. Obs. 156, 7. S. C.

To, or by feme
covert.

partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both^a. A warrant of attorney to confess judgment to a *feme covert*, is void^b: and the court, on motion, set aside a judgment on a warrant of attorney given by a *feme covert*, although she had been divorced a *mens et thoro*^c. So, where a *feme covert* was taken in execution, on a judgment entered up on a warrant of attorney, given by her in an assumed name, the court discharged her out of custody, and set aside the judgment, on a summary application, though the creditor was wholly ignorant of the marriage^d. But, in a former case^e, where a *feme covert*, who lived by herself and acted as a *feme sole*, gave a warrant of attorney to confess a judgment, and afterwards moved to set aside the judgment, because she was covert, the court of King's Bench would not relieve her, but put her to her writ of error. A warrant of attorney given by a client to his attorney, as a security for future costs, is illegal^f. But a warrant of attorney given to secure the payment of future costs, and also of costs and money already due and advanced, though void as to the client's future liability, is valid as to the actual liability^g. And a stipulation that judgment shall not be entered up on a warrant of attorney, before a certain day, unless the party giving it shall in the mean time have become *bankrupt*, or *insolvent*, does not oust the party to whom it is given from the right to enter up judgment before the day specified, if the former be in insolvent circumstances, although he may not have become bankrupt, or taken the benefit of an insolvent debtors' act^h. It has been doubted whether, in an action upon an *Irish* judgment, entered up on a warrant of attorney, the grounds of such judgment are examinable by the courts hereⁱ: And the court of King's Bench would not decide the question, whether a joint stock company was a nuisance, within the statute 6 Geo. I. c. 18. upon motion to set aside a judgment confessed to them on a warrant of attorney^k.

On Irish judg-
ment, &c.

^a *Brutton v. Burton*, 1 Chit. Rep. 707; but see *Stead v. Salt*, 10 Moore, 389. 3 Bing. 101. S. C. *Rathbone v. Drakeford*, 4 Moore & P. 57. 6 Bing. 375. S. C.

^b *Roberts v. Pierson*, 2 Wils. 3.

^c *Faithorne v. Blaquiere*, 6 Maule & S. 73.

^d *Selby v. White*, 4 Leg. Obs. 349, 50. per *Patteson*, J.

^e *Anon.* 1 Salk. 400; and see *Maclean v. Douglass*, 3 Bos. & P. 128. *Wilkins v. Wetherill*, *id.* 220.

^f *Jones v. Hunter*, 1 Dowl. Rep. 462. per *Patteson*, J.

^g *Holdsworth v. Wakeman*, 1 Dowl. Rep. 532. 5 Leg. Obs. 429. S. C. per *Parke*, J.

^h *Biddlecombe v. Bond*, 5 Nev. & M. 621. 1 Har. & W. 612. S. C.

ⁱ *Guinness v. Carroll*, 1 Barn. & Ad. 459.

^k *Brown v. Holt*, 4 Taunt. 587; and for other cases in which the courts will not interfere, see *Tidd Prac.* 9 Ed. 547, 8.

When the defendant is in custody by arrest, it is a rule in the courts of King's Bench and Common Pleas ^a, that "no bailiff or sheriff's officer shall presume to exact or take from him any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, who shall subscribe his name thereto; which warrant shall be produced, when the judgment is acknowledged." But it having been deemed sufficient for the *plaintiff's* attorney to be present, and subscribe the warrant, as attorney for the defendant ^b, another rule was made, in the King's Bench ^c, that "no warrant of attorney executed by any person in custody of a sheriff, or other officer, for the confessing of judgment, shall be valid, or of any force, unless there be present some attorney on the behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant of attorney, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof": And accordingly, by a general rule of all the courts ^d, "no warrant of attorney to confess judgment, given by any person in custody of a sheriff or other officer, upon *meine* process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney." Since the making of this rule, where a debtor, being arrested, offered a warrant of attorney, and the plaintiff's attorney, who had also advised the defendant in the previous stages of the business, came at his request, to the place where he was in custody, and proposed another attorney, whom he brought with him, to read over the warrant of attorney to the defendant, and attest it on his behalf, in which the defendant acquiesced, but the attorney so introduced was not known to or sent for by him, the court held that this was not a compliance with the rule, and set aside the warrant of attorney, and proceedings thereon, for irregularity ^e. And it has been decided by the court of King's Bench, in a recent case ^f, that the presence and

Attorney's presence necessary, on giving warrant of attorney, by prisoner.

^a R. E. 15 Car. II. reg. II. K. B.
R. H. 14 & 15 Car. II. reg. IV. C. P.

^b Fell v. Riley, 2 Str. 1245.

^c R. E. 4 Geo. II. K. B. 2 Str. 902.
Watkins v. Hanbury, Cowp. 281; and
see Tidd Prac. 9 Ed. 548, 9.

^d R. H. 2 W. IV. reg. 1. § 72. 3
Barn. & Ad. 384. 8 Bing. 298, 9. 2
Crompt. & J. 188.

^e Walker v. Gardner, 4 Barn. & Ad.
371.

^f Verge v. Dodd, E. 11 Geo. IV. K. B.

attestation of an attorney, who had not taken out his certificate within a year, is insufficient ^a.

Leave to enter up judgment on old warrant of attorney, how obtained.

In the King's Bench, if the warrant of attorney were above a year old, application must formerly have been made to the court in term time, or, if it were not above *ten* years old, to a judge in vacation, for leave to enter up judgment thereon ^b; but if it were above *ten* years old, the application must have been made to the court, as a judge would not make an order in vacation ^b; and where it was above *twenty* years old, there must in general have been a rule to shew cause ^c, founded on an *affidavit*, stating facts which rebutted the presumption of payment ^d. In the Common Pleas, if a warrant of attorney were above *one*, and under *ten* years old, leave to enter judgment thereon might have been given on a side-bar or treasury rule ^e; but if it were above *ten* years old, the court must have been moved for leave to enter up judgment ^e: If the warrant of attorney were under *twenty* years old, the common *affidavit* of the due execution of the warrant, that the debt was unpaid, and parties living, was deemed sufficient to induce the court to grant an absolute rule; but if the warrant were above *twenty* years old, the rule must have been to shew cause, and served on the defendant ^f. And now, by a general rule of all the courts ^g, "leave to enter up judgment on a warrant of attorney, above *one* and under *ten* years old, must be obtained by a motion in term, or by order of a judge in vacation; and if *ten* years old or more, upon a rule to shew cause." On this rule, a rule *nisi* was holden to be unnecessary, for entering judgment on a warrant of attorney under *ten* years old, notwithstanding it appeared that the defendant was insane, and had been so for a considerable period, and there did not appear to be any chance of his recovery ^h.

Affidavit for, how entitled.

The *affidavit* of the due execution of the warrant of attorney, &c. may, it seems, be *entitled* in the cause in which the judgment is to be entered up ⁱ; but where it was not so entitled, the court held it to

^a *Verge v. Dodd*, E. 11 Geo. IV. K. B.

^b Imp. K. B. 10 Ed. 433.

^c Anon. 1 Chit. R. 618. *in notis*.

^d *Hulke v. Pickering*, 2 Barn. & C. 555. 4 Dowl. & R. 5. S. C.

^e Anon. Barnes, 47.

^f *Id. ibid.*; and see *Roundel v. Powell*, Cas. Pr. C. P. 145, 6. Tidd *Prac.* 9 Ed. 484, 485, 6. (y.) 552, 3.

^g R. H. 2 W. IV. reg. 1. § 73. 3

Barn. & Ad. 384. 8 Bing. 299. 2 Crompt. & J. 188; and see *Fursey v. Pilkington*, 7 Leg. Obs. 332. 8 Leg. Obs. 205, 6. S. C. *per Parke, J.*

^h *Piggot v. Killick*, 4 Dowl. Rep. 287. 1 Har. & W. 518. 11 Leg. Obs. 117. S. C.

ⁱ *Sowerby v. Woodroff*, 1 Barn. & Ald. 567; and see *Manley v. Marquis of Blandford*, *id.* 568. (a).

be sufficient^a. This affidavit should regularly be made by the attesting witness; or, if he cannot be met with^b, or reside out of the jurisdiction of the court^c, an *affidavit*, verifying his handwriting, will be deemed sufficient. Where the attesting witness was ill in bed, his affidavit was holden to be necessary; and without it, the rule could not be granted^d. And where he cannot be met with, the court must be informed by *affidavit*, of the endeavours which have been made to find him, before they will admit secondary evidence^e. In the King's Bench, the acknowledgment of the warrant of attorney by the defendant, will be no waiver of the objection^f: But in the Common Pleas, if *A.* agree to acknowledge an old warrant of attorney given by him, so as to entitle *B.* to enter up judgment thereon, judgment may be entered up, under a judge's order, without an affidavit of the attesting witness^g: and that court allowed judgment to be entered up on an old warrant of attorney, upon an affidavit by the plaintiff's agent, that he saw the defendant execute the warrant of attorney, which was given to secure a sum of money due to the plaintiff, which remained due and unpaid^h. In the Exchequer, an *affidavit* by the plaintiff's attorney, that the debt was unpaid, was deemed sufficient to support a motion to enter up judgment on an old warrant of attorney, where the attorney swore that he had been employed in managing the money, and receiving and paying over the interestⁱ. So, where the attesting witness to a warrant of attorney, was the clerk of the attorney preparing it, the want of his *affidavit* on signing judgment, was holden to be sufficiently supplied by that of his master, verifying the handwriting of his clerk, and of the defendant, and stating that the clerk had absconded, and could not be found^k. And a rule was obtained to enter up judgment on an old warrant of attorney, where the attesting witness to the execution of it was dead, and, to prove the execution, an affidavit was made by one of the plaintiffs, verifying the

By whom made.

^a *Ex parte Gregory*, 8 Barn. & C. 409.
Davis (or Haward) v. Stanbury, 3 Dowl. Rep. 440. 9 Leg. Obs. 415. S. C. *per Gurney*, B.; and see *Poole v. Robberds*, 1 Barn. & Ald. 568. (a.)

^b *Jones v. Knight*, 1 Chit. R. 743; and see *Holiday v. Ld. Oxford*, 10 Leg. Obs. 430.

^c *Appleton v. Bond*, 1 Chit. R. 744.

^d *Owen v. Holles*, 4 Dowl. Rep. 572.
 11 Leg. Obs. 260. S. C.

^e 1 Chit. Rep. 743. (b). *Waring v.*

Bowles, 4 Taunt. 132.

^f *Jones v. Knight*, 1 Chit. R. 743.
Appleton v. Bond, *id.* 744; and see *Holiday v. Ld. Oxford*, 10 Leg. Obs. 430.

^g *Laing v. Raine*, 2 Bos. & P. 85.

^h *Huthwaite v. Hood*, 5 Moore & P. 321.

ⁱ *Ashman v. Bowdler*, 2 Crompt. & M. 212. 4 Tyr. Rep. 84. S. C.

^k *Young v. Showler*, 2 Dowl. Rep. 556.
 9 Leg. Obs. 14. S. C. *per Patterson*, J.

handwriting of the witness^a. If the witness will not join in the necessary affidavit, the court will compel him by rule to do so^b. And where the plaintiff, being a *lunatic*, did not swear that the money was unpaid, but another did, who had received the interest upon the bond for *three* years, ever since the plaintiff was a *lunatic*, the court of Common Pleas held this to be sufficient^c. But where an old warrant of attorney was given to secure the doing of an act, as the re-transfer of stock upon demand, the court refused permission to enter up judgment, on proof of a demand made whilst the defendant was *insane*^d.

At what time it must state defendant was alive.

In the King's Bench, if the defendant resided in *town*, the rule formerly was, that it should appear by the *affidavit*, that he was alive at a certain time, within *two* or *three* days, or, if in the *country*, within a *week* or *ten* days, before the application was made; an *affidavit* that he was alive on or about a particular day, being deemed insufficient^e. And as all judgments in actions by *bill*, formerly related to the *first* day in full term, (and the judgment on a warrant of attorney in that court was always so entered,) it must have been positively sworn that the defendant was alive, either on the *first*, or upon some subsequent day in full term^f: information and belief, even though the party kept out of the way to avoid being seen, was not deemed sufficient^g. In the Common Pleas it has been said, that by the practice of the court, it must appear by the affidavit, that the defendant was alive within a *fortnight* before the making of the application^h: and it was formerly necessary, by a rule of that courtⁱ, "to state in the *affidavit*, that he was alive on a day *within the term* in which the motion was

^a *Constable v. Wren*, 3 Moore & S. 216 (a.); and see *Taylor v. Leighton*, 3 Moore & S. 423. 2 Dowl. Rep. 746. S. C.

^b *Clark v. Elwick*, 1 Str. 1. Anon. Barnes, 58. *Weston v. Faulkner*, 1 Price, 308. 1 Chit. R. 743. (b.) *Caffin v. Idle*, M. 3 Geo. IV. K. B.

^c *Coppendale v. Sunderland*, Barnes, 42.

^d *Capper v. Dando*, 4 Nev. & M. 335. 2 Ad. & E. 468. 1 Har. & W. 11. S. C.

^e Anon. per Cur. H. 41 Geo. III. K. B. 1 Chit. R. 617. (a.); and see *Willes v. James*, (or *Willis v. Jervis*), 1 Dowl. Rep. 496. 5 Leg. Obs. 270. 2 Moore & S. 36. (a.) S. C. per *Littledale*, J.

^f *Eyles v. Warren*, 4 Maule & S. 174. ——— v. *Hobson*, 1 Chit. R. 314: 617. (a.) Anon. 1 Leg. Obs. 398. per *Tamson*, J.; and see *Price v. Hughes*, 1 Dowl. Rep. 448. 4 Leg. Obs. 409. S. C. per *Patteson*, J.

^g ——— v. *Hobson*, 1 Chit. R. 314; and see *Sanders v. Jones*, 1 Dowl. Rep. 387. Anon. 1 Leg. Obs. 237. S. C. per *Parke*, J. Anon. 4 Leg. Obs. 237. per *Tamson*, J.; and see *Tidd Prac.* 9 Ed. 554.

^h Anon. per *Heath*, J. T. 33 Geo. III. C. P. Imp. C. P. 7 Ed. 451.

ⁱ R. T. 59 Geo. III. C. P. 1 Brod. & B. 385. 3 Moore, 606. 2 Chit. R. 380, 81.

made:" In the construction of which rule, it was holden not to be sufficient to swear that he was alive on the *essoign* day^a; and this rule seems to have been adopted in the Exchequer^b. But now, as judgment may be signed in *vacation*, as well as in *term* time, and according to the new rules, relates to the day on which it is signed, the *affidavit* in support of a motion to enter up judgment on a warrant of attorney need not state, as formerly, in any of the courts, that the defendant was alive on a day in term^c; but it is sufficient to shew by affidavit, that he was alive within a *reasonable* time before the day on which the motion is made^d. In a late case^e, the court of King's Bench granted a rule, moved for on the *third* day of term; upon an affidavit stating that the defendant was alive on a day *six* days previously to the commencement of the term^d: and a rule was granted in a subsequent case^f, where the defendant had been last seen alive above *three* weeks, and in another^g, *five* weeks before the application. In order to obtain judgment on an old warrant of attorney, the defendant must not only be stated to have been *seen* within a reasonable period, but to have been seen *alive*^h. Where a letter, however, had been recently received, in the handwriting of the defendant, it was deemed sufficient evidence that he was alive, in order to sign judgment on an old warrant of attorneyⁱ. When the defendant resides abroad, a longer time is of course allowed, according to circumstances^k: and, in one case^l, the court gave leave to enter up judgment on an old warrant of attorney, in *Michaelmas* term; the

When defendant is abroad.

^a Anon. 4 Moore, 2; and see Tidd *Prac.* 9 Ed. 554, 5.

^b Man. Ex. Pr. 1 Ed. 504.

^c Cockman v. Hellyer, 1 Bing. N. R. 3. 4 Moore & S. 487. 8 Leg. Obs. 173. S. C.; and see *id.* 469, 70. Jordan v. Farr, 4 Nev. & M. 347. Robinson v. Lester, 8 Dowl. Rep. 531. 10 Leg. Obs. 61. S. C.

^d Jordan v. Farr, 4 Nev. & M. 347. 2 Ad. & E. 437. S. C.; and as to what shall be deemed a reasonable time, see 4 Nev. & M. 347. (a.)

^e Jordan v. Farr, 4 Nev. & M. 347. 2 Ad. & E. 437. S. C.

^f Watts v. Bury, 4 Dowl. Rep. 44. 1 Har. & W. 371. S. C. 10 Leg. Obs. 525. S. C.

^g Stocks v. Willes, 13 Leg. Obs. 29; and see Phillips v. Waters, 11 Leg. Obs.

213. Krell v. Joy, 4 Dowl. Rep. 600. 1 Har. & W. 670. 11 Leg. Obs. 325. S. C.

^h Chell v. Oldfield, 4 Dowl. Rep. 629. 11 Leg. Obs. 403. S. C. *per Patteson*, J.

ⁱ Gray v. Withers, 4 Dowl. Rep. 636. 1 Har. & W. 659. 11 Leg. Obs. 404. S. C. *per Patteson*, J.

^k Horsley v. Shuter, Barnes, 54. Roundell (or Roundel) v. Powell, (or Powel,) *id.* 256. Cas. Pr. C. P. 146. Willes, 66. S. C. Pemberton v. Browning, 9 Moore, 389. 2 Bing. 204. S. C. Fraser v. Giles, 13 Leg. Obs. 61.

^l Hopley v. Thornton, 2 Dowl. & R. 19; and see Pemberton v. Browning, 9 Moore, 389. 2 Bing. 204. S. C. Fursey v. Pilkington, 2 Dowl. Rep. 432. 7 Leg. Obs. 332. 8 Leg. Obs. 205, 6. S. C. *per Parks*, J. Fraser v. Giles, 13 Leg. Obs. 61.

affidavit stating that the defendant was alive at *New South Wales*, in the month of *August* preceding, as appeared by a letter received from him of that date, and that deponent verily believed him to be still alive ^a. But where it appeared by the plaintiff's affidavit, that he was resident in an enemy's country, the court refused to allow judgment to be entered up on an old warrant of attorney ^b.

Affidavits in
Scotland, before
whom sworn.

It seems, that an affidavit of the due execution of the warrant of attorney, &c. sworn before a justice of the peace in *Scotland*, is admissible, if the handwriting of the justice be authenticated ^c. But an affidavit sworn before a justice of the peace at *Edinburgh*, was in one case ^d, deemed insufficient for entering up judgment on an old warrant of attorney; and in another case ^e, it was said that the affidavit should have been made before a lord of session: These cases, however, seem to have been overruled by subsequent decisions ^f. The production of an office copy of the affidavit of the due execution of a warrant of attorney, will be sufficient to obtain a rule to sign judgment thereon ^g. But it is not sufficient for the attesting witness to sign the affidavit, in the character of the commissioner before whom it was sworn ^h.

Provisions of
stat. 3 Geo.
IV. c. 39. as
to filing war-
rants of attorney,
&c.

Extended to
assignees of in-
solvent debtors.

Warrant of at-
torney, and cog-
novit actionem,
not to be acted

The provisions of the statute 3 Geo. IV. c. 39. as to filing warrants of attorney, or true copies thereof ⁱ, &c. are not repealed by the 6 Geo. IV. c. 16. § 81. to amend the laws relating to bankrupts, which is confined to executions *bond fide* executed or levied more than *two* months before the issuing of the commission ^k. These provisions were extended to assignees of insolvent debtors, by the 5 Geo. IV. c. 61. § 16. and 7 Geo. IV. c. 57. § 33. And, by the latter statute ^l, it is enacted, that "in all cases where any prisoner who shall petition "the insolvent debtors' court for relief under that act, shall have

^a *Hopley v. Thornton*, 2 Dowl. & R. 12; and see *Pemberton v. Browning*, 9 Moore, 389. 2 Bing. 204. S. C. *Fursey v. Pilkington*, 2 Dowl. Rep. 452. 7 Leg. Obs. 332. 8 Leg. Obs. 205, 6. S. C. *per Parke, J. Fraser v. Giles*, 13 Leg. Obs. 61.

^b *De Luneville v. Phillips*, 2 New Rep. C. P. 97.

^c *Turnbull v. Moreton*, 1 Chit. Rep. 721, 2. *Watson v. Williamson*, 1 Dowl. Rep. 607. ^d Leg. Obs. 305. S. C. Excheq.

^e *Knight v. Hennell*, M. 46 Geo. III. K. B.

^f *Sinclair v. Assignees of Rentoul*, M.

23 Geo. III. K. B.

^g *Tidd Prac.* 9 Ed. 166. 181; and see further, as to the affidavit for entering up judgment on an old warrant of attorney, *id.* 553, 4.

^h *Webb v. Webb*, 4 Dowl. Rep. 599. 11 Leg. Obs. 325, 6. S. C.

ⁱ *Field v. Bearcroft*, 2 Crompt. & J. 217. 2 Tyr. Rep. 283. 1 Dowl. Rep. 308. S. C.

^l For these provisions, see *Tidd Prac.* 9 Ed. 553, 6.

^k *Wilson v. Whitaker*, 1 Moody & M. 8. *per Abbott, Ch. J.*

^l § 34.

"executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued, or to be issued, upon any judgment obtained, or to be obtained, upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or any part thereof; of, or by sale of such property theretofore seized, or any part thereof; but that any person or persons, to whom any sum or sums of money shall be due in respect of any such warrant of attorney, or *cognovit actionem*, shall and may be a creditor or creditors for the same, under that act." On this statute it has been holden, that a sale of the goods of an insolvent, under a *fieri facias*, issued upon a warrant of attorney given by the insolvent, is invalid, if it take place after the commencement of the insolvent's imprisonment, notwithstanding the goods may have been seized under the writ, before the imprisonment^a. But doubts having arisen, whether warrants of attorney executed by insolvent debtors, before adjudication made in the matter of their petition, pursuant to the several acts passed for their relief, were to be deemed secret warrants of attorney, within the meaning and provisions of the 3 Geo. IV. c. 39, it was declared and enacted by a subsequent statute^b, that "such warrants of attorney, executed and to be executed as aforesaid, are not within the meaning and provisions of the said act of 3 Geo. IV. c. 39; and that the same have been, are, and shall be valid and effectual, any thing in the said last mentioned act, or in any act extending the provisions thereof, notwithstanding."

upon, against property of insolvent, after his imprisonment.

Warrants of attorney, executed by insolvent debtors before adjudication, not within 3 Geo. IV. c. 39.

An *affidavit* made by an attesting witness to the warrant of attorney, and filed with it, merely stating its date, and that he saw the party execute the same, without specifying the day on which it was executed, has been deemed insufficient, under the statute 3 Geo. IV. c. 39. § 1; and the sheriff, who had seized and sold goods under a writ issued at the suit of a judgment creditor, on a judgment entered upon the warrant of attorney, was holden to be liable to the assignees of the party whose goods were seized, in an action of *trover*, a commission of bankrupt having been issued against him, after the seizure and before the sale^c. But in order to let in the objection that the statute has not been complied with, it must first appear that there

Decisions on that statute.

^a Kelcey v. Minter, 1 Bing. N. R. 721.

^c Dillon v. Edwards, 2 Moore & P.

1 Hodges, 177. 1 Scott, 616. S. C.

550.

^b 11 Geo. IV. & 1 W. IV. c. 38. §. 2.

is a valid commission against the party; and it seems, that it lies upon him who seeks to impeach the warrant of attorney, to shew that it was not filed ^a.

Compounding
penal action.

In the Common Pleas, where part of the penalty went to the crown, it was formerly usual to give notice to the solicitor to the treasury, and the consent of one of the king's counsel or serjeants must have been obtained, before the motion could have been granted, for leave to compound a penal action ^b: And, by a general rule of all the courts ^c, "leave to compound a penal action shall not be given, in cases where part of the penalty goes to the crown, unless notice shall have been given to the proper officer; but in other cases, it may."

^a *Aireton v. Davis*, 3 Moore & S. 138. see Tidd *Prac.* 9 Ed. 557.

9 Bing. 740. S. C.

^c R. H. 2 W. IV. reg. I. § 99. 3

^b *Howard v. Sowerby*, 1 Taunt. 103.

Sheldon v. Mumford, 5 Taunt. 268; and

Barn. & Ad. 389. 8 Bing. 303. 2 Crompt. & J. 196.

CHAP. XXII.

Of JUDGMENTS by CONFESSION, and DEFAULT; the ASSESSMENT of DAMAGES, by REFERENCE to the MASTER or PROTHONOTARIES, or by WRIT of INQUIRY; and PROCEEDINGS on the STATUTE 8 & 9 W. III. c. 11. § 8.

WHEN the defendant, having no merits, cannot compromise or compound the action, it is usual for him to confess it, or let judgment go by default. In the former case, it is said to have been the constant practice in the Common Pleas, to take *cognovits* before declaration, and judgments have been entered thereon: which practice was recognised by a decision of that court ^a; and it has been since allowed in the King's Bench ^b. So, in the Exchequer, it has been holden that a *cognovit* may be given after process sued out, and before it is served ^c. A mere *cognovit* need not be stamped, unless it contain any terms of agreement between the parties ^d. And it does not require a stamp, although the plaintiff, at the time of its execution, undertake, on a separate paper, to give the defendant time ^e. But judgment and execution on a *cognovit*, embodying a matter of agreement of 20*l*. value, were set aside with costs, for want of a stamp on the *cognovit*: The court, however, suffered it to remain on the file; and it having been afterwards stamped, a fresh judgment was signed, and execution taken out thereon ^f.

Confessing action.

Before declaration.

Stamping *cognovit*.

^a Webb v. Aspinall, 7 Taunt. 701. 1 Moore, 428. S. C.

^b Charlwood v. Mauley, 1 Leg. Obs. 126. 174, 5. § 2, Leg. Obs. 61, 2. S. C. Morley v. Hall, 2 Dowl. Rep. 494. *per* Taunton, J.

^c Kerbey v. Jenkins, 2 Tyr. Rep. 499. and see Wade v. Swift, 8 Price, 513.

^d Anon. *per* Cur. M. 42 Geo. III.

K. B. Ames v. Hill, 2 Bos. & P. 150. C. P. Reardon v. Swaby, 4 East, 188.

Jay v. Warren, 1 Car. & P. 532. *per* Abbott, Ch. J.; and see 4 Leg. Obs. 75. Green v. Gray, 1 Dowl. Rep. 350. 4 Leg. Obs. 203. S. C. *per* Taunton, J.

^e Morley v. Hall, 2 Dowl. Rep. 494. *per* Taunton, J.

^f Pitman v. Humfrey, 2 Tyr. Rep. 500.

Attorney's presence necessary, on giving *cognovit* by prisoner.

In the King's Bench, a *cognovit* given by a defendant in custody on *mesne* process, was deemed valid, although no attorney was present on the part of the defendant, unless it were shewn that some undue advantage was taken of him^a. But, in the Common Pleas, if a *cognovit* were given by a prisoner in custody of a sheriff's officer, it seems that an attorney must have been present on behalf of the defendant, to attest the execution of it^b; and where a defendant, on being arrested by a sheriff's officer, gave a *cognovit* to the plaintiff, who was attorney in the cause, without an attorney being present on his part, such *cognovit* was holden to be void, by the court of Common Pleas, though the plaintiff swore he did not know that the defendant was in custody^c: And now, by a general rule of all the courts^d, "no *cognovit actionem* given by any person in custody of the sheriff, or other officer, upon *mesne* process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney." On this rule, the court will set aside a *cognovit*, and the proceedings thereon, unless it appear to have been given in the presence of an attorney, named by the prisoner, and attending at his request^e. And if a defendant has reason to suppose he is in custody, a *cognovit* given by him at that time will be bad, if an attorney be not present^f. But the declaration of an attorney, required by the rule, that he is the attorney of the defendant, in attesting the execution of a *cognovit*, need not be made in writing on the *cognovit*^g.

Withdrawing plea, on confessing action.

When the confession is after plea pleaded, the defendant's attorney, or his clerk, used formerly to come in person before the Master, to

^a Lee v. Thurston, 1 Chit. R. 267; and see Hodgkinson v. Whalley, 2 Crompt. & J. 86. (a.)

^b Paul v. Cleaver, 2 Taunt. 360. Webb v. Aspinall, 7 Taunt. 701. 1 Moore, 428. S. C. Arnold v. Lowe, 7 Taunt. 708. (a.)

^c Webb v. Aspinall, 7 Taunt. 701. 1 Moore, 428. S. C.; and see Paul v. Cleaver, 2 Taunt. 360. Arnold v. Lowe, T. 57 Geo. III. C. P. 7 Taunt. 703. (a.) Tidd Prac. 9 Ed. 550. 560.

^d R. H. 2 W. IV. reg. 1. § 72. 3 Barn.

& Ad. 384. 8 Bing. 298, 9. 2 Crompt. & J. 186.

^e Fisher v. Nicholas, (or Papanicholas,) 2 Dowl. Rep. 251. 2 Crompt. & M. 215. 4 Tyr. Rep. 44. 8 Leg. Obs. 76. S. C. Excheq.

^f Turner v. Shaw, 2 Dowl. Rep. 244. 7 Leg. Obs. 524, 5. S. C. Excheq.; but see Bligh v. Brewer, 1 Crompt. M. & R. 651. 5 Tyr. Rep. 222. 3 Dowl. Rep. 266. S. C.

^g Robinson v. Brooksbank, 4 Dowl. Rep. 395. 11 Leg. Obs. 407. S. C.

withdraw it, in the King's Bench ^a; but this was deemed unnecessary in the Common Pleas ^b: And, by a general rule of all the courts ^c, "where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person, without the appearance of the attorney or his clerk for that purpose, before the officer of the court."

Judgment by *default* is regularly signed, either when the defendant does not plead at all to the action, or, when under terms of pleading issuably, he does not plead an issuable plea; or when his plea is not adapted to the nature of the action, or may be considered as a nullity; or, in some cases, when his plea is false and vexatious; or in general, when it is not pleaded in due time, or proper manner ^d: and if the defendant plead in *abatement*, without an *affidavit* of the truth of the plea ^e, or with an *affidavit* sworn several days before the delivery of the declaration ^f; or a plea of *tender*, without paying money into court ^g; or several pleas, avowries or cognizances, without a rule for that purpose when required ^h; or any plea which ought to be signed by counsel or a serjeant, without its being so signed ⁱ; or if, after craving *oyer* of a deed, he do not set forth the whole of it ^k, the plaintiff, in either of these cases, may sign judgment as for want of a plea.

Judgment by default, in what cases signed.

A judgment by *default*, is *interlocutory* or *final*: After interlocutory judgment, the amount of the damages sustained by the plaintiff is ascertained, either by reference to the Master in the King's Bench, or prothonotaries in the Common Pleas, or one of the Masters in the Exchequer; or by writ of inquiry in ordinary cases, or on breaches suggested under the statute 8 & 9 W. III. c. 11. § 8. The plaintiff,

Interlocutory, or final.

Damages, on interlocutory, how ascertained.

^a Anon. 1 Ld. Raym. 345. Imp. K. B. 10 Ed. 422.

^b Imp. C. P. 7 Ed. 439. Tidd Prac. 9 Ed. 560.

^c R. H. 2 W. IV. reg. 1. § 100. 3 Barn. & Ad. 389. 8 Bing. 303, 4. 2 Cromp. & J. 196.

^d Tidd Prac. 9 Ed. 563, &c.

^e Wilson v. Palmer, Pr. Reg. C. P. 4. De la Fountain v. Mings, *id. ib.* Phelps v. Lewis, Forrest, 144; and see Sherman v. Alvarez, 1 Str. 639. 2 Ld. Raym. 1409. S. C. Bray v. Haller, 2 Moore, 213; but see Pether v. Shelton, 1 Str. 638.

^f Bower (or Westerdale) v. Kemp, 1

Cromp. & J. 287. 1 Tyr. Rep. 260. 1 Dowl. Rep. 281. S. C. Johnson v. Popplewell, 2 Cromp. & J. 544. 2 Tyr. Rep. 715. S. C.; but see Lang v. Comber, 4 East, 348. Baskett v. Barnard, 4 Maule & S. 332. 1 Tyr. Rep. 261. (a.)

^g Pether v. Shelton, 1 Str. 638. Bray v. Booth, Barnes, 252.

^h R. H. 2 W. IV. reg. 1. § 34. 3 Barn. & Ad. 378. 8 Bing. 293.

ⁱ Tidd Prac. 9 Ed. 671, 2, 3.

^k Wallace v. Duchess of Cumberland, 4 Durnf. & E. 370. Slater v. Horne, E. 34 Geo. III. K. B. Lockhart v. Mackreth, 5 Durnf. & E. 662, 3.

Rule or order
of reference to
Master, &c.

in the King's Bench, must sign interlocutory judgment, before he can have a rule to refer it to the Master to compute principal and interest on a bill of exchange, whether it be a judgment for want of a plea, or on demurrer^a, or for not producing the record^b. This rule, however, may be obtained on the day on which interlocutory judgment is signed for want of a plea^c, or for not producing the record^d; but where it is signed on *demurrer*, it has been the practice not to move for the rule until the following day^e; and in that court, the rule absolute for computing principal and interest on a bill of exchange, must be served on the defendant before final judgment can be signed, as well as the rule *nisi*^f. In the Common Pleas, a rule absolute may be drawn up by the *secondaries* during term, on a judge's order dated in vacation^g.

Service of.

In the King's Bench, service of a rule *nisi* to compute, by putting it under the door of the defendant's chambers, is not sufficient, although the laundress state that the defendant will probably have the rule in the course of the day^h: and it is not sufficient to serve the rule, by leaving it at the lodgings of the defendant, with his landlady, without an acknowledgment from the defendant that he has received itⁱ. But where an attorney has been served with process at chambers, from which he afterwards goes away to an unknown residence, a rule to compute may be served, by leaving a copy at those chambers, (they being his last place of abode,) and sticking another up in the King's Bench office^k. And after the court had given leave to stick up a notice of declaration in the King's Bench office, it having been impossible to find the defendant, they granted leave, on the same motion, to stick up a rule *nisi* to compute, and afterwards the rule absolute, in that office^l, on an affidavit shewing what endeavours had since been made to find the defendant^l. In the Exchequer, service of a rule *nisi* to compute, on the mother of the defendant, at his

^a *Burton v. Stanley*, M. 57 Geo. III. 6 Maule & S. 382.

^b *Moses v. Compton*, *id.* 381.

^c *Pocock v. Carpenter*, 3 Maule & S. 109.

^d *Russen v. Hayward*, 5 Barn. & Ald. 752. 1 Dowl. & R. 444. S. C.

^e *Pocock v. Carpenter*, 3 Maule & S. 109; and see *Gordon v. Corbett*, 3 Smith R. 179.

^f *Bank of England v. Atkins*, 1 Chit. R. 466. *Dawson v. Sladford*, *id.* 468; and see *George v. Baynton*, 6 Leg. Obs.

124, 5. *per Taunton*, J. Tidd Prac. 9 Ed. 572.

^g *Swaine v. Stone*, 4 Moore & S. 584.

^h *Strutton v. Hawkes*, 3 Dowl. Rep. 25.

ⁱ *Gardner v. Green*, 3 Dowl. Rep. 343. 9 Leg. Obs. 348. S. C. *per Patteson*, J.

^k *Sealey v. Robertson*, 2 Dowl. Rep. 568. 8 Leg. Obs. 381. S. C. *per Patteson*, J.

^l *Broom v. Stittle*, 1 Har. & W. 672; but see *Martin v. Colvill*, 2 Dowl. Rep. 694.

residence, has been deemed sufficient^a. But a rule *nisi* to compute having been left at the apartments of a defendant, in which there was no person, although it was ascertained that the defendant resided there, was holden not to be good service^b. So, a rule *nisi* to compute, served by leaving a copy at a warehouse where the bill of exchange was made payable, but which was shut up at the time, was deemed insufficient^c. And where the rule was served at *York*, on the day cause was to be shewn, it was deemed insufficient to authorize making the rule absolute, although *ten* days had elapsed after the service^d. When there are two defendants, service, in the King's Bench, should be on both^e. But, in the Exchequer, where several defendants suffer judgment by default, in action on a promissory note, service of the rule on one, is service on both^f. And it is sufficient, in all the courts, to serve a copy of the rule, without shewing the original^g.

The writ of inquiry of damages is either at common law, or by statute. Before the late act for the more speedy judgment and execution, in actions brought in his majesty's courts of law at *Westminster*, and in the court of Common Pleas of the county palatine of *Lancaster*^h, &c. writs of inquiry could only have been made returnable in *term* timeⁱ; and consequently, when they were executed in *vacation*, the plaintiff must have waited until the ensuing term, before he could have obtained final judgment, or taken out execution. This practice having occasioned great delay, by reason of the interval between the terms, it was enacted by the above statute^k, that "any writ of inquiry of damages, to be issued in or by either of the said courts, by whatever form of process the action may have been commenced, may be made returnable, and be returned on any day certain, in term or vacation, to be named in such writ; and such writ shall be as valid and effectual, as if the same had been returnable according to the course of the common law."

Writ of inquiry,
how returnable,
before stat. 1
W. IV. c. 7.

May now be
made returnable
on any day to be
named therein.

^a *Warren v. Smith*, 2 Dowl. Rep. 216.

^b *Chaffers v. Glover*, 5 Dowl. Rep. 81.
12 Leg. Obs. 75. S. C.; and see *Alanson v. Walker*, 3 Dowl. Rep. 258. *per Gurney*, B.; but see *Payett v. Hill*, 2 Dowl. Rep. 688. *semb. contra. Ante*, 246.

^c *Castle v. Sowerby*, 4 Dowl. Rep. 669.

^d *Farrell v. Dale*, 2 Dowl. Rep. 15. 6 Leg. Obs. 315. S. C.

^e *Flindt v. Bignell & another*, M. 56 Geo. III. K. B. 1 Chit. R. 466. (a.)

^f *Figgins v. Ward*, 2 Crompt. & M.

424. 4 Tyr. Rep. 282. 2 Dowl. Rep. 364. S. C.

^g *Bellairs v. Poultney*, 6 Maule & S. 230. 1 Chit. R. 466, 7. (a.) S. C. K. B. *Holmes v. Senior*, 4 Moore & P. 628. 7 Bing. 162. S. C. C. P. *Poole v. Sweeting*, 1 Price N. R. 171. Excheq.; and see *Tidd Prac.* 9 Ed. 572.

^h Stat. 1 W. IV. c. 7.

ⁱ *Tidd Prac.* 9 Ed. 574.

^k § 1.

Before whom
executed.

Good jury, on
inquiry.

Notice of in-
quiry, to whom
given.

In joint action.

In country
causes.

Must be given
in town.

In Exchequer.

The writ of inquiry, in ordinary cases, may be executed, on due notice, before the sheriff or his deputy^a; or, by leave of the court, under special circumstances, before the chief justice^b, or a judge of assize; as an assistant to the sheriff^b: and, in the latter case, it was formerly usual to move the court, for the sheriff to return a good jury^c: But, by a general rule of all the courts^d, "there shall be no rule for the sheriff to return a good jury, upon a writ of inquiry; but an order shall be made by a judge upon summons, for that purpose." Since the making of this rule, the costs of a good jury, upon the execution of a writ of inquiry, are allowed on taxation^e.

The notice of inquiry should be in writing^f; and if the defendant has appeared, and his attorney be known, it should be delivered to such attorney^f: but if the defendant have not appeared, or his attorney be unknown, the notice should be delivered to the defendant himself, or left at his last place of abode^f: and, in a joint action, the notice of inquiry ought to be given to both defendants^f. In *country* causes, it seems that in the King's Bench^g, as well as in the Common Pleas^h, notice of inquiry might formerly have been given either to the attorney in the country, or to the agent in town; but it was afterwards determined, in the King's Bench, that if an attorney were employed, notice of inquiry should be delivered to the agent in town, who issued the *subpoenas*, and not to the attorney in the countryⁱ. And now, by a general rule of all the courts^k, "notice of inquiry shall be given in town." In the Exchequer, notices of inquiry were formerly required to be entered by the attornies or side clerks of the office of pleas, in the book of orders kept in such office, and a written notice of such entries, left at the seat in the said office, of the attorney or clerk in court concerned for the defendant, or at his chambers, or place of residence^l: Therefore, where the notice of executing a writ of inquiry was served upon the defendant personally, and not upon his attorney or clerk in court, the service was holden to be insufficient^m.

^a Denny v. Trapnell, 2 Wils. 379.

^b Tidd Prac. 9 Ed. 576.

^c Id. 484. 486. 576. 787.

^d R. H. 2 W. IV. reg. 1. § 101. 3 Barn. & Ad. 389. 8 Bing. 304. 2 Crompt. & J. 197.

^e Wilkinson v. Malin, 1 Crompt. & M. 237. 3 Tyr. Rep. 255. 1 Dowl. Rep. 630. S. C.

^f Tidd Prac. 9 Ed. 576.

^g Bell v. Trevera, M. 23 Geo. III.

K. B. 3 East, 569.

^h Smith v. Lacock, Barnes, 305.

ⁱ Hayes v. Perkins, 3 East, 568.

^k R. H. 2 W. IV. reg. 1. § 57. 3 Barn. & Ad. 381. 8 Bing. 296. 2 Crompt. & J. 57.

^l R. H. 39 Geo. III. in Scac. Man. Ex. Append. 224. 8 Price, 503, 4.

^m Brooks v. Till, 2 Younge & J. 276; but see Knibbs v. Hopcraft, 10 Price, 147, *semb. contra*.

But now, by a rule of that court ^a, all notices are required to be given by and to the attornies in the cause. Notice of the execution of a writ of inquiry, however, was allowed to be served, by sticking it up in the office, and leaving a copy of it at the defendant's last place of abode, though neither the process, nor notice of declaration, had been personally served ^b.

Short notice of inquiry is *two* days at least ^c: but a defendant who is under terms to take short notice of trial, is not bound to take short notice of inquiry ^d. A *term's* notice of inquiry might formerly have been given, in the King's Bench, before the *first* day in full term ^e: In the Common Pleas, it must have been given before the *essoign* day of the *fifth*, or other subsequent term ^f: But, by a general rule of all the courts ^g, "where a term's notice of inquiry is required, such notice may be given at any time before the *first* day of term." There were formerly different rules, in the King's Bench ^h, Common Pleas ⁱ, and Exchequer of Pleas ^k, as to the notice of inquiry, where the defendant, after notice of trial, suffered judgment to go by default, or demurred to the declaration, replication, or other subsequent pleading; or in case the defendant pleaded a plea in bar, or rejoinder, &c. to which the plaintiff demurred: But now, by a general rule of all the courts ^l, "in all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney may give notice of trial, at the time of delivering his replication, or other subsequent pleading; and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication, or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, such notice shall operate from the time that notice of trial was given as aforesaid: and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or

Short notice of inquiry.

Term's notice.

Notice of inquiry, where defendant, after notice of trial, lets judgment go by default, or demurs to declaration, &c.

^a R. M. 1 W. IV. reg. II. § 7. Excheq. Dax. Append. xxviii. ix. 1 Crompt. & J. 277. 1 Tyr. Rep. 159.

^b Watson v. Delcroix, 2 Dowl. Rep. 396. 4 Tyr. Rep. 266. 2 Crompt. & M. 425. S. C.

^c Butler v. Johnson, Barnes, 301. Pr. Reg. 390. S. C.

^d Stevens (or Stephens) v. Pell, 2 Dowl. Rep. 355. 2 Crompt. & M. 421. 4 Tyr. Rep. 267. S. C.

^e Imp. K. B. 10 Ed. 412.

^f R. E. 13 Geo. II. reg. 2. C. P.; and

see Tidd Prac. 9 Ed. 577.

^g R. H. 2 W. IV. reg. I. § 52. 3 Barn. & Ad. 381. 8 Bing. 295. 2 Crompt. & J. 182.

^h R. H. 8 Geo. I. K. B.

ⁱ R. H. 6 Geo. I. reg. I. R. T. 10 Geo. I. C. P.

^k R. T. 26 & 27 Geo. II. § 4. Man. Ex. Append. 211; and see Tidd Prac. 9 Ed. 578, 9.

^l R. H. 2 W. IV. reg. I. § 59. 3 Barn. & Ad. 381, 2. 8 Bing. 296. 2 Crompt. & J. 184.

Continuance, or countermand, of notice of inquiry.

the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry, on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar, or rejoinder, &c. to which the plaintiff demurs, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry, on the back of such demurrer." In the King's Bench, the continuance, or countermand, of notice of inquiry must formerly have been delivered to the agent in town, and not to the attorney in the country^a: but now, by a general rule of all the courts^b, "notice of continuance of inquiry shall be given in town; but countermand of notice of inquiry may be given either in town or country, unless otherwise ordered by the court or a judge."

Proceedings to be had at return of inquiry, in ordinary cases.

At the return of the writ of inquiry, in ordinary cases, it is enacted by the speedy judgment and execution act^c, that "a rule for judgment may be given, costs taxed, and final judgment signed, and execution issued forthwith; unless the sheriff, or other officer before whom the same may be executed, shall certify^d under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court, to set aside the execution of such writ, or one of the judges of the said court shall think fit to order^e the judgment to be stayed, until a day to be named in such order. Provided always, that in case the signing of judgment on such writ shall be postponed, by reason of such certificate or order, or by the choice of the plaintiff or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record, as of the day of the return of such writ, unless the court shall otherwise direct."

Rule for judgment unnecessary, on writ of inquiry.

In the King's Bench, the plaintiff must formerly have given a rule for judgment with the clerk of the rules, on the return day of the writ of inquiry, which expired in *four* days^f: This practice is recognised by the above statute: In the Common Pleas, there was no rule for judgment given on the return of the inquiry, but the plaintiff's attorney waited *four* days after the return day, inclusive of both days; after which, the inquisition being previously obtained from the sheriff, the prothonotaries would have taxed the costs thereon^g: And now, by a general rule of all the courts^h, "after the return of a writ of

^a Imp. K. B. 10 Ed. 415. Tidd *Prac.* 9 Ed. 97. 580.

^b R. H. 2 W. IV. reg. I. § 57. 3 Barn. & Ad. 381. 8 Bing. 296. 2 Crompt. & J. 183.

^c 1 W. IV. c. 7. § 1.

^d Append. to Tidd *Sup.* 1833, p. 300.

^e *Id. ib.*

^f Clerk v. Rowland, 1 Salk. 399.

^g Imp. C. P. 7 Ed. 437.

^h R. H. 2 W. IV. reg. I. § 67. 3 Barn. & Ad. 383. 8 Bing. 297, 8. 2 Crompt. & J. 186.

inquiry, judgment may be signed at the expiration of *four* days from such return, without any rule for judgment."

By other clauses of the speedy judgment and execution act ^a, which relates to judgments on nonsuit or verdict for either party, as well as to judgments on writs of inquiry, "every judgment to be signed by "virtue of that act, may be entered and recorded as the judgment of "the court wherein the action shall be depending, although the court "may not be sitting on the day of the signing thereof; and every execution issued by virtue of that act, shall and may bear *teste* on the "day of issuing thereof; and such judgment and execution shall be "as valid and effectual, as if the same had been signed and recorded, "and issued, according to the course of the common law ^b. Provided always, that notwithstanding any judgment signed or recorded, "or execution issued, by virtue of that act, it shall be lawful for the "court in which the action shall have been brought, to order such "judgment to be vacated, and execution to be stayed or set aside, "and to enter an arrest of judgment, or grant a new writ of inquiry, "as justice may appear to require; and thereupon the party affected "by such writ of execution, shall be restored to all that he may "have lost thereby, in such manner as upon the reversal of a judgment by writ of error or otherwise, as the court may think fit to "direct" ^c.

Entering and recording judgment.

Teste of execution.

Court may order judgment to be vacated, execution stayed, or new writ of inquiry granted.

By the statute 8 & 9 W. III. c. 11. § 8, it is enacted, that "in "all actions upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, "deed, or writing contained, if judgment shall be given for the "plaintiff on a demurrer, or by confession or *nihil dicit*, the plaintiff, "upon the roll, may *suggest* as many breaches of the covenants and "agreements as he shall think fit; upon which shall issue a writ to "the sheriff of that county where the action shall be brought, "to "summon a jury to appear before the justices or justice of assize "or *nisi prius* of that county, to enquire of the truth of every one "of those breaches, and to assess the damages that the plaintiff shall "have sustained thereby; in which writ it shall be commanded to "the said justices or justice of assize or *nisi prius*, that he or they "shall make a return thereof, to the court from whence the same "shall issue, at the time in such writ mentioned. And in case defendant or defendants, after such judgment entered, and before "any execution executed, shall pay unto the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his

Proceedings for assessing damages, on breaches suggested under stat. 8 & 9 W. III. c. 11. § 8.

Execution to be stayed, on payment of damages.

^a 1 W. IV. c. 7. § 3, 4.

^c *Id.* § 4.

^b *Id.* § 3.

Judgment to remain, to answer any further breach; and plaintiff may have a *scire facias* thereon, against the defendant, &c.

" or their executors or administrators, such damages so to be assessed, by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands or goods of the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record. But, notwithstanding, such judgment shall remain, continue and be, as a further security to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants, in the same indenture, deed, or writing contained; upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment, against the defendant, or against his heir, terretenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause, why execution shall not be had or awarded upon the said judgment; upon which there shall be the like proceeding as was in the action of *debt* upon the said bond or obligation, for assessing of damages, upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as aforesaid; and that upon payment or satisfaction, in manner as aforesaid, of such future damages, costs and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."^a

Writs of inquiry, under the above statute, to be executed before sheriff, unless otherwise ordered.

The assessment of damages before a judge of assize or *nisi prius*, on breaches suggested under the above statute, being attended with great delay and expense to the parties, it was enacted by the statute 3 & 4 W. IV. c. 42. § 16, that "all writs issued under and by virtue of the statute 8 & 9 W. III. c. 11. § 8, shall, unless the court where such action is pending, or a judge of one of the superior courts, shall otherwise order, direct the sheriff of the county where the action shall be brought, to summon a jury to appear before such sheriff, instead of the justices or justice of assize or *nisi prius* of that county, to inquire of the truth of the breaches

^a For the proceedings on this statute, breaches thereon, see Tidd *Prac.* 9 Ed. and the mode of suggesting or assigning, 583. 686. 1108.

“ *suggested*, and assess the damages that the plaintiff shall have sustained thereby; and shall command the said sheriff, to make return thereof to the court from whence the same shall issue, at a day certain, in term or in vacation, in such writ to be mentioned: and such proceedings shall be had, after the return of such writ, as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or *nisi prius*.”

This statute is applicable to cases where breaches are *suggested* on the roll, after judgment for the plaintiff on demurrer, or by confession or *nihil dicit*, in an action upon bond, or on any penal sum, for non-performance of any covenants and agreements, in any indenture, deed, or writing contained; and does not seem to extend to those, where the plaintiff *assigns* breaches of the condition of the bond, &c. in his declaration, or replication; and, an issue or issues being joined thereon, a *venire facias* is awarded, as well to try the issue or issues, as to assess damages upon the breaches assigned. But, in cases to which the statute applies, the plaintiff need not apply to the court or a judge, for leave to issue a writ to inquire of the truth of the breaches suggested, and assess the damages that he hath sustained thereby; but may, if he think fit, issue such writ as a matter of course, unless the court where the action is pending, or a judge of one of the superior courts, shall otherwise order, and proceed thereon to assess damages, according to the statute. For this purpose, the plaintiff is authorized, after *suggesting* breaches on the roll ^a, to sue out a writ of inquiry, directed to the sheriff of the county where the action is brought; commanding him to summon a jury to appear before him, to inquire, on their oath, of the truth of the breach or breaches suggested, and assess the damages which the plaintiff shall have sustained thereby; and that he make return thereof to the court, at a day certain, in term or vacation, to be mentioned therein ^b.

The writ of inquiry is engrossed on parchment: and, in the King's Bench, it is sealed only; but, in the Common Pleas, it is signed by the prothonotaries, and afterwards sealed ^c; and should be delivered to the sheriff, who will thereupon summon a jury for the execution of it. A copy of the writ should also, it seems, be delivered to the defendant, or his attorney ^d: and, previously to its execution, a *notice* of inquiry ^e should be given, in the usual way ^f, to inquire of the

Construction of stat. 3 & 4 W. IV. c. 42. § 16.

In cases to which it applies, writ of inquiry may be issued of course, unless otherwise ordered.

Direction, and form of writ of inquiry.

Signing and sealing.

Delivery of, to sheriff.

Delivery of copy to defendant.

Notice of inquiry.

^a Append. to Tidd *Sup.* 1833, p. 301.

13 Price, 791. S. C.

^b *Id.* 302, 3, 4.

^c Append. to Tidd *Sup.* 1833, p. 304.

^d Tidd *Prac.* 9 Ed. 574.

^e Tidd *Prac.* 9 Ed. 576.

^f Gillingham v. Waskett, M'Clel. 568.

truth of the breaches suggested, and to assess the damages which the plaintiff hath sustained thereby: and if either party propose to attend by counsel, he should give notice thereof to his adversary, or he will not be allowed for it in costs ^a.

Proceedings to be had at return of inquiry, on stat. 8 & 9 W. III. c. 11. § 8.

At the return of the writ of inquiry, for assessing damages under the statute 8 & 9 W. III. c. 11. § 8. it is declared by the law amendment act ^b, that "costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff, or his deputy, before whom the writ of inquiry was executed, shall certify, under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court for a new inquiry, or a judge of any of the courts shall think fit to order that judgment or execution shall be stayed, until a day to be named in such order. Provided, that all and every the provisions contained in the statute made and passed in the first year of the reign of his present Majesty, intituled, 'an Act for the more speedy judgment and execution in actions brought in his majesty's courts of law at *Westminster*, and in the court of Common Pleas of the county palatine of *Lancaster*, and for amending the law as to judgment on a *cognovit actionem*, in cases of bankruptcy', shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon such writs of inquiry, in like manner as if the same were expressly re-enacted therein." ^d

Provisions of stat. 1 W. IV. c. 7. extended to such writs of inquiry.

Writs of inquiry, &c. in C. P. at *Lancaster*, how returnable.

In the Common Pleas at *Lancaster*, by the statute 39 & 40 Geo. III. c. 105. ^e for better regulating the practice, and preventing delays in the proceedings of that court, writs of inquiry of damages, and certain other writs in the said act in that behalf mentioned, issued by and out of the same court, might have been made returnable on any of the return days in *Easter* and *Michaelmas* terms respectively, according to the course of his majesty's court of Common Pleas at *Westminster*, in addition to the first and last days of each assizes held for the said county. And it being deemed expedient to quicken the proceedings in the said court of the said county, it is enacted by the statute 1 W. IV. c. 7. ^f, that "in lieu of the return days in *Easter* and *Michaelmas* terms, all writs of inquiry of damages, and other writs in the said last mentioned act in that behalf mentioned, shall and may be made returnable in the said court of the said county,

^a Tidd *Prac.* 9 Ed. 580.

^e § 2. and see stat. 22 Geo. II. c. 46.

^b 3 & 4 W. IV. c. 42. § 18.

§ 35.

^c 1 W. IV. c. 7.

^f § 8.

^d 3 & 4 W. IV. c. 42. § 19.

“ on the first *Wednesday* in every month, in addition to the first and
“ last days of each assizes held for the said county; and such pro-
“ ceedings shall and may be had on the return thereof, as upon such
“ writs returnable according to the law in force at and before the
“ passing of that act.” By a subsequent statute, for improving the
practice and proceedings in the court of Common Pleas of the county
palatine of *Lancaster* ^a, “ every writ of inquiry for assessing damages
“ on the statute 8 & 9 W. III. c. 11. § 8, shall command the sheriff to
“ make return thereof to the said court, on a day certain in such writ
“ to be mentioned ^b; and every other writ of inquiry to be issued by
“ the said court of Common Pleas at *Lancaster*, shall be made return-
“ able on any day certain, to be named in such writ.” ^c

^a 4 & 5 W. IV. c. 62.

^c § 19.

^b § 18.

CHAP. XXIII.

Of Oyer and Copy of Deeds, &c.; Inspection of Court Rolls, and Corporation Books; and Particulars of Demand, and Set-off.

Inserting oyer of deed, at head of plea.

WHEN the defendant, having demanded *oyer* of a deed, did not insert it at the head of his plea, the plaintiff, in the Common Pleas, might have inserted it there for him, in making up the issue, or demurrer-book^a: In the King's Bench, it was otherwise^b: But, by a general rule of all the courts^c, "if a defendant, after craving *oyer* of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer-book, may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer."

Rule for copyhold tenant to inspect court rolls.

In the King's Bench, if the rule to inspect court rolls were moved for on behalf of a copyhold tenant, it was absolute in the first instance^d; otherwise, it was only a rule *nisi*^e: In the Common Pleas, it was always a rule to shew cause^f: But, by a general rule of all the courts^g, "an order upon the lord of a manor, to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an *affidavit* that the copyhold tenant has applied for and been refused inspection." This rule, however, it has been said, only extends to applications when there is a cause in court^h: and therefore, when that is not the case, the rule to inspect court rolls is, it seems, only a rule *nisi*^h.

^a *Weaver's Company v. Ware*, Barnes, 327.

^b *Weaver's Company v. Forrest*, 2 Str. 1241. *Simmonds v. Parmenter*, 1 Wils. 97.; and see *Steph. Pl.* 88, 9. *Tidd Prac.* 9 Ed. 589.

^c R. H. 2 W. IV. reg. I. § 44. 3 Barn. & Ad. 380. 8 Bing. 294. 2 Crompt. & J. 180.

^d *Rex v. Shelley*, 3 Durnf. & E. 141.

^e *Rex v. Allgood*, 7 Durnf. & E. 746.;

and see *Rogers v. Jones*, 5 Dowl. & R. 484.

^f *Folkard v. Hemet*, 2 Blac. Rep. 1061; and see further as to the inspection of court rolls, *Tidd Prac.* 9 Ed. 485, 6. 486. (a.) 487, 8. 594, 5.

^g R. H. 2 W. IV. reg. I. § 102. 3 Barn. & Ad. 389. 8 Bing. 304. 2 Crompt. & J. 197.

^h *Ex parte Best*, 3 Dowl. Rep. 38. 9 Leg. Obs. 138. S. C. per *Littledale*, J.

The books of a *corporation* are in the nature of public books^a: and every member of the corporation, having an interest therein, has a right to inspect and take copies of them, for any matter that concerns himself, though it be in a dispute with others^b. But where the defendants were sued by a corporation for making, while directors, false entries in the books of the corporation, it was holden that they were not entitled to inspect them; at all events, not without an *affidavit*, that such inspection was necessary to their defence^c. It is also a general rule, that the court will not grant an application by members of a corporate body, for a *mandamus* to inspect the documents of a corporation, unless it be shewn that such inspection is necessary, with reference to some specific dispute, or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent, as may be necessary for the particular occasion^d: Therefore, where members of a corporation, merely alleging grounds on which they believed its affairs were improperly conducted, and the officers unduly chosen, and complaining of misgovernment in some particular instances, not affecting the parties themselves, or any matter then in dispute, applied for a *mandamus* to the master and wardens, to allow them to inspect and take copies of all records, books and muniments, in the possession of the master and wardens, belonging to the company, or relating to its affairs, the court discharged the rule, with costs^d.

Corporation
books.

When the declaration does not disclose the particulars of the plaintiff's demand, and they are not delivered with the declaration, or notice thereof, the defendant's attorney or agent may take out a summons before a judge, for the plaintiff's attorney or agent to shew cause, why he should not deliver to the defendant's attorney or agent,

Summons for
particulars of
plaintiff's de-
mand.

^a Warriner v. Giles, 2 Str. 954, 5; and see Coombs v. Coether, 1 Moody & M. 398. Brett v. Beales, *Id.* 416. 419. Hill v. Manchester and Salford Water Works Company, 2 Nev. & M. 573. 5 Barn. & Ad. 866. S. C.

^b Rex v. Newcastle-upon-Tyne, 2 Str. 1223. Richards v. Pattinson, Barnes, 235. Com. Rep. 555. S. C.

^c Imperial Gas Company v. Clarke, 7 Bing. 95. 4 Moore & P. 727. S. C.

^d Rex v. Merchant Tailors' Company,

2 Barn. & Ad. 115. *Ex parte* Norman, 1 Leg. Obs. 349, 50. S. C.; and see Mayor of London v. Swinland, 1 Barnard. 455. Crew v. Saunders, 2 Str. 1005. Rex v. Newcastle-upon-Tyne, *id.* 1223. Rex v. Purnell, 1 Wils. 239. 1 Blac. Rep. 40. S. C. Corporation of Barnstable v. Lathey, 3 Durnf. & E. 303. Ramsbottom v. Cooper, 2 Chit. Rep. 231. Anon. *id.* 290. but see Rex v. Babb, 3 Durnf. & E. 579; and see Tidd *Prac.* 9 Ed. 596.

May be obtained before appearance.

the *particulars* in writing of the plaintiff's demand, for which the action is brought, and why all proceedings should not in the mean time be stayed^a. This summons might formerly have been taken out, and an order obtained thereon, in the King's Bench, before the defendant had appeared^b; and there was a rule in the Common Pleas^c, by which the practice in this respect was made conformable to that of the court of King's Bench: In the Exchequer, however, the defendant could not have an order for particulars of the plaintiff's demand, except by consent, unless he made an *affidavit*, that he had never had the particulars, or that he had mislaid them, or that he was not sufficiently acquainted with the particulars, and that therefore he was advised he could not safely proceed to trial without them^d: But, by a general rule of all the courts^e, "a summons for particulars, and order thereon, may be obtained by a defendant before appearance; and may be made, if the judge think fit, without the production of any *affidavit*."

When required to be delivered with declaration, or notice thereof.

By a general rule of all the courts^f, it is ordered, that "with every declaration, if *delivered*, or with the notice of declaration, if *filed*, containing counts in *indebitatus assumpsit*, or *debt* on simple contract, the plaintiff shall deliver *full* particulars of his demand under those counts^g, where such particulars can be comprised within *three folios*; and where the same cannot be comprised within *three folios*, he shall deliver such a *statement*^h of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of *folios*: And, to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver". This rule is not, it seems, imperative on the plaintiff to deliver particulars, or a statement of his demand, with the declaration, or notice thereof; though, if he omit

Consequence of not delivering them.

Decisions thereon.

^a *Le Breton v. Braham*, 3 Bur. 1390. Imp. C. P. 7 Ed. 185, 6; and see *Tidd Prac.* 9 Ed. 596. Append. thereto, Chap. XXIII. § 3.

^b *Derry v. Lloyd*, 1 Chit. R. 724, 5. (a.)

^c R. T. 2 Geo. IV. C. P. 6 Moore, 211.

^d *Dax Pr.* 59.; and see *Price Pr.* 309, 10. 2 Crompt. & J. 253. (a.) *Tidd Prac.*

9 Ed. 596.

^e R. H. 2 W. IV. reg. I. § 47. 3 Barn. & Ad. 380. 8 Bing. 294. 2 Crompt. & J. 181.

^f R. T. 1 W. IV. reg. II. 2 Barn. & Ad. 788, 9. 7 Bing. 783. 1 Crompt. & J. 470, 71.

^g Append. to *Tidd Sup.* 1832, p. 113.

^h *Id. ib.*

to deliver such particulars or statement, he will not be allowed for them in costs, if afterwards called for and delivered. And the delivery of a particular of the plaintiff's demand, under the *indebitatus* counts, will not prevent him from giving evidence on a special count in his declaration, if he has not included that part of his claim in his particular of demand; as a particular is only necessary to explain the common counts^a. In cases to which the rule applies, where the particulars exceed *three folios*, the court will order the plaintiff to deliver to the defendant *full* particulars of his demand, the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial, even though the defendant has had full particulars of the account before action brought^b. But the plaintiff is not bound to specify in his particulars, the sums received by him on account^c. In order to obtain particulars in an action of *trespass*, *trover*, or on the *case*, it seems to be necessary to produce an *affidavit*, denying the defendant's knowledge of what the plaintiff is proceeding for^d. And the court will not compel a plaintiff, suing for the breach of an agreement, and assigning by way of special damage, that he has incurred certain expenses, to furnish particulars of such special damage^e. After the delivery of particulars under a judge's order, a defendant, we have seen^f, is allowed, by a general rule of all the courts^g, the same time for pleading, which he had at the return of the summons; nevertheless, judgment shall not be signed, till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge.

In actions for wrongs.

Time for pleading, after delivery of bill of particulars.

At the trial, an erroneous date in a bill of particulars, or a mistake therein, which is not calculated to mislead the defendant, will not preclude the plaintiff from recovering his demand^h. And a

Effect of mistake in bill of particulars, at trial.

^a Day v. Davies, 5 Car. & P. 340. *per* Tindal, Ch. J.; and see Cooper v. Amos, 2 Car. & P. 267. *per* Abbott, Ch. J. Fisher v. Wainwright, 1 Meeson & W. 480. 5 Dowl. Rep. 102, S. C.

^b James v. Child, 2 Crompt. & J. 252. 2 Tyr. Rep. 302. 1 Dowl. Rep. 310. S. C.

^c Smith v. Eldridge, 5 Nev. & M. 408. 1 Har. & W. 527. S. C. Penprase v. Crease, 1 Meeson & W. 36. 1 Tyr. & G. 468. 4 Dowl. Rep. 711. S. C. Randall v. Ikey, 4 Dowl. Rep. 682. 12 Leg. Obs. 196. S. C.; but see Adlington v. Appleton, 2 Campb. 410. *semd. contra*.

^d Snelling v. Chennels, 5 Dowl. Rep.

80. 12 Leg. Obs. 75. S. C.

^e Retallick v. Hawkes, 1 Meeson & W. 573.

^f *Ante*, 229.

^g R. H. 2 W. IV. reg. I. § 48. 3 Barn. & Ad. 380. 8 Bing. 294, 5. 2 Crompt. & J. 181.

^h Millwood v. Walter, 2 Taunt. 224; and see Harrison v. Wood, 8 Bing. 371. Lambirth v. Roff, 1 Moore & S. 597. 8 Bing. 411. S. C. Bagster v. Robinson, 2 Moore & S. 160. 9 Bing. 77. S. C. Spencer v. Bates, 1 Gale, 108. Fisher v. Wainwright, 1 Meeson & W. 480. 1 Tyr. & G. 606. 5 Dowl. Rep. 102. 12 Leg. Obs. 99, 100. S. C.

printer, who had let out men, presses and type, for the printing of a newspaper, was allowed to recover, in an action for work and labour, although his particular described the demand to be "for composing and printing a certain newspaper," &c.; the defendants not having, at the trial, availed themselves of the variance between the particular and the evidence^a. So, though the particulars of demand vary from the evidence which the plaintiff adduces, yet, if the defendant appears and defends, and is not misled by them, the variance is no ground for nonsuiting the plaintiff^b. But where the plaintiff's bill of particulars stated the cause of action to be for the amount of stakes deposited in the defendant's hands, by the plaintiff and R. and won by the plaintiff of R., the court held that he could not recover the amount of his own stake, on proof that he had redemanded it from the defendant, before it was paid over^c.

Particulars of
set-off.

As the defendant is allowed to call for the particulars of the plaintiff's demand, so, when the defendant pleads a *set off* for goods sold, &c. the plaintiff may take out a summons for the particulars; upon which the judge will make an order, which should be regularly drawn up and served^d, for the defendant to deliver them in a certain time, or, in default thereof, that he be precluded from giving evidence at the trial, in support of his set off^e. And where an order was obtained for the delivery of particulars of set off within a *fortnight*, and they were not delivered for *five* weeks, but after delivery an order was made by consent for the amendment of the declaration, this was holden to be a waiver of the irregularity, in the delivery of the particulars^f. But the demand of particulars of set off, delivered after a plea which was a nullity, was holden to be no waiver of the plaintiff's right to sign judgment^g.

Copy of particulars of demand, or set off, to be annexed to record.

A copy of the particulars of the plaintiff's demand, and also a copy of the particulars, if any, of the defendant's set off^h, should by a general rule of all the courtsⁱ, be annexed by the plaintiff's attorney to every record, at the time it is entered with the judge's marshal. And when

^a Bagster v. Robinson, 2 Moore & S. 160. 9 Bing. 77. S. C.

^b Green v. Clark, 2 Dowl. Rep. 18. 6 Leg. Obs. 362. S. C. Spencer v. Bates, 1 Gale, 108.

^c Davenport v. Davies, 1 Meeson & W. 570.

^d R. H. 59 Geo. III. K. B. *Ante*, 257.

^e For the form of particulars of set-off, see Append. to Tidd *Prac.* 9 Ed. Ch. XXIII. § 10. Chit. *Sum.* Pr. 362; and

for the effect of such particulars, see Andrews v. Bond, 8 Price, 213.

^f Wallis v. Anderson, 1 Moody & M. 291. *per* Ld. Tenterden, Ch. J.

^g Ford v. Bernard, 6 Bing. 534. 4 Moore & P. 302. S. C.

^h Append. to Tidd *Sup.* 1832, p. 113.

ⁱ R. T. 1 W. IV. reg. II. 2 Barn. & Ad. 788, 9. 7 Bing. 783. 1 Crompt. & J. 470, 71. 4 Car. & P. 603.

the bill of particulars of the plaintiff's demand is appended to the record, it is not necessary to prove the delivery of it to the defendant^a. Particulars of demand having been delivered to the defendant's attorney under a judge's order, another bill of particulars was afterwards annexed to the record by the plaintiff's attorney, pursuant to the above rule, as and for a copy of the particulars of the demand, but in fact containing *items* not stated in the particulars delivered to the defendant; the plaintiff's evidence at the trial was confined to the *items* exclusively set forth in the particular annexed to the record; the defendant not being prepared to prove the delivery of the particulars to his attorney, under the judge's order, did not apply for a nonsuit; and the court, under these circumstances, granted a new trial without costs, but refused to enter a nonsuit^b.

^a *Macarthy v. Smith*, 8 Bing. 145. 1 2 Crompt. & J. 461. 1 Dowl. Rep. 570.
Moore & S. 227. 1 Dowl. Rep. 253. S. C. S. C.

^b *Morgan v. Harris*, 2 Tyr. Rep. 385.

CHAP. XXIV.

Of CHANGING the VENUE.

In what cases venue may in general be changed, and in what not.

THE defendant is, in general, allowed to change the venue in all *transitory* actions, arising in a county different from that where the plaintiff has laid it^a: and he may even change it from *London* to *Middlesex*^b, or *vice versa*^c. But the venue cannot be changed in *local* actions^d; though the court or a judge, on the application of either party, may order the issue to be tried in another county^e: and in *transitory* actions, where material evidence arises in two counties, the venue may be laid in either^f; and if it be laid in a third county, the courts will not change it; for the defendant, in such case, cannot make the necessary *affidavit*, that the cause of action arose in a particular county, and not elsewhere^g. As it is necessary, however, for changing the venue, that the cause of action should be wholly confined to a single county, the courts will not in general change it in an action of *debt* on bond, or other specialty^h, or in *covenant* on a leaseⁱ, or mortgage^k, or policy of insurance by deed^l, or in *assumpsit* on an award^m, or charterparty of affreightmentⁿ, unless some special ground

^a R. M. 1654. § 5. K. B. R. M. 1654.

§ 8. C. P. Everest v. Sansum, Barnes, 491.

^b Gifford v. Lechmere, 2 Str. 857. Stoneham v. Dent, Barnes, 487. Pr. Reg. 430. S. C.

^c Watkins v. Towers, 2 Durnf. & E. 275. Biddolph v. Browne, Cas. Pr. C. P. 41; and see Gallant v. Squire, Pr. Reg. 429, 30. Bickley v. Mackerell, Barnes, 481.

^d Rex v. Barton, Say. Rep. 146.

^e Post, 307.

^f Bulwer's case, 7 Co. 2. (a.) Anon. 2 Salk. 669. R. M. 10 Geo. II. reg. 2. (o.) K. B. Watkins v. Towers, 2 Durnf. & E. 275. Mayor, &c. of London v. Cole, 7 Durnf. & E. 583. Jenkins v. Hutton,

7 Moore, 520.

^g Tidd Prac. 9 Ed. 603. (g.)

^h Id. 604. (a.)

ⁱ Anon. 2 Chit. R. 419, 20. Rohrs (or Bohrs) v. Sessions, 4 Tyr. Rep. 275. 2 Dowl. Rep. 699. S. C.

^k Crompton v. Stewart, 2 Crompt. & J. 473. Anon. 2 Tyr. Rep. 501. S. C.

^l Smith v. Stansfield, 1 M'Clel. & Y. 212.

^m Whitburn v. Staines, 2 Bos. & P. 355. Stanway v. Heslop, 3 Barn. & C. 9. 4 Dowl. & R. 635. S. C.

ⁿ Morrice v. Hurry, 7 Taunt. 306. 1 Moore, 54. S. C.; but see Pickard v. Featherstone, 12 Moore, 161. 4 Bing. 39. S. C.

be laid ^a; for *debitum et contractus sunt nullius loci*; and bonds, and other specialties, are *bona notabilia* wherever they happen to be ^b. And it is now holden in the King's Bench, agreeably to the practice of the court of Common Pleas, that the venue cannot be changed, unless upon a special ground, in an action upon a promissory note, or bill of exchange ^c; which practice also prevails in the Exchequer ^d. But the venue may still be changed, in an action upon a policy of insurance, not being by deed ^e, or in any other action, the right of which is founded upon simple contract ^f. It may also be changed in an action on a written agreement, not under seal, where the plaintiff does not undertake to give material evidence in the first county ^g; or upon a written agreement, to pay a sum of money on a day certain, and if not then paid, to secure the same by mortgage ^h. And where a cause of action having arisen in *London*, the plaintiff, in order to obtain a more speedy execution, laid the venue in *Surrey*, and the prothonotary having refused to tax the full costs incurred by the plaintiff in taking the cause down to *Guildford* for trial, the court ordered the taxation to be reviewed ⁱ.

Though the courts, in general, will not change the venue, when it is laid in a proper county, yet they will change it even then, upon a special ground ^k. And when a fair and impartial trial cannot be had in the county where the venue is laid, the courts, on an *affidavit* of the circumstances, will change it in *transitory* actions ^l; or, in *local* actions, would formerly have given leave to enter a suggestion on the roll, with a *nient dedire*, in order to have the trial in an *adjoining*

Changing it on special ground.

When impartial trial cannot be had.

In local actions.

^a Pole v. Horrabin, M. 22 Geo. III. K. B. cited in 1 Durnf. & E. 782. (a.) Foster v. Taylor, 1 Durnf. & E. 781; and see Watt v. Daniel, 1 Bos. & P. 425. Hodinott v. Cox, 8 East, 268.

^b Pinkney v. Collins, 1 Durnf. & E. 571.

^c Tidd Prac. 9 Ed. 604.

^d Roberts v. Wright, 1 Tyr. Rep. 533. 1 Dowl. Rep. 294. S. C. per Bayley, B.; and see Slack v. Chew, 3 Tyr. Rep. 810. Dalton v. Trevillion, 5 Tyr. Rep. 216.

^e Holcroft v. Collwest, Andr. 66. Howarth v. Willett, 2 Str. 1180. Kirk v. Broad, Say. Rep. 7. Watkins v. Towers, 2 Durnf. & E. 275. Cailland v. Champion, 7 Durnf. & E. 205; but see Smith v. Stansfield, 1 M'Clel. & Y. 212.

^f Kirk v. Broad, Say. Rep. 7.

^g Roberts v. Wright, 1 Tyr. Rep. 532. 1 Crompt. & J. 547. 1 Price N. R. 88. 1 Dowl. Rep. 294. S. C.

^h Slade v. Trew, 1 Crompt. & M. 584. 2 Dowl. Rep. 65. S. C.

ⁱ Vere v. Moore, 3 Bing. N. R. 261. 13 Leg. Obs. 109, 10. S. C.

^k Anon. 2 Chit. Rep. 418, 19. For the cases in which the venue may be changed on a special ground, see Tidd Prac. 9 Ed. 605; and as to the motion for changing it in such case, see *id.* 613.

^l Mayor of Poole v. Bennett, 2 Str. 874. Mylock v. Saladine, 3 Bur. 1564. 1 Blac. Rep. 460. S. C.; but see Foley v. Ld. Peterborough, H. 25 Geo. III. K. B.

By consent of parties.

county^a. So, the parties by *consent* might have changed the venue in *local* actions^b; or had them tried out of their proper county, such consent being entered by suggestion on the roll^c: And where, by consent of both parties, the venue was laid in *London*, the court held that no objection could afterwards be taken to the venue, notwithstanding it ought, under an act of parliament, to have been laid in *Surrey*^d. It being found, however, that unnecessary delay and ex-

By law amendment act.

pense were sometimes occasioned by the trial of *local* actions in the county where the cause of action had arisen, it was enacted by the law amendment act^e, that "in any action depending in any of the superior courts of common law at *Westminster*, the venue in which is by law *local*, the court in which such action shall be depending, or any judge of any of the said courts, may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose, any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place." An application by the plaintiff, to change the venue in a local action, under the above statute, cannot be made till issue is joined^f. And in *ejectment*, to try the validity of a will on the ground of insanity, the court refused to enter a suggestion on the roll, under the above statute, to change the venue from *Somersetshire* to *London*, on the ground that the testator resided in *London* at the time of his death, and that the evidence of an eminent medical man, living in *London*, was essential, where it appeared that the testator was most visited and best known at his country estate in *Somersetshire*, where the will was made, and in which county there were also many witnesses^g.

^a *Regina v. Delme*, 10 Mod. 198. *Biron v. Philips*, 1 Str. 235. *Rex v. Harris*, 3 Bur. 1334. *Rex v. Amery*, 1 Durnf. & E. 363; and see *Tidd Prac.* 9 Ed. 605, 6.

^b *Mayor, &c. of Bristol v. Proctor*, 1 Wils. 298. *Groves v. Durall*, H. 38 Geo. III. K. B.

^c *Fonnerau v. Fonnerau*, in K. B. *per Cur.*

^d *Furnival v. Stringer*, 1 Bing. N. R. 68. 4 Moore & S. 578. S. C.

^e 3 & 4 W. IV. c. 42. § 22; and see

3 Rep. C. L. Com. 14. 73.

^f *Bell v. Harrison*, 4 Dowl. Rep. 181. 1 Gale, 269. 2 Crompt. M. & R. 733. 1 Tyr. & G. 193. S. C.; and see *Maude (Rohrs or Bohrs) v. Sessions*, 1 Crompt. M. & R. 86. 4 Tyr. Rep. 275. 2 Dowl. Rep. 699. S. C. *Parmeter v. Otway*, 3 Dowl. Rep. 66. *per Littledale, J. Youde v. Youde*, 4 Dowl. Rep. 32. 1 Har. & W. 338. 10 Leg. Obs. 157. S. C. *per Coleridge, J.*

^g *Doe d. Baker v. Harmer*, 1 Har. & W. 80.

In the King's Bench, the rule to change the venue, in ordinary cases, is absolute in the first instance: In the Common Pleas and Exchequer, it was formerly only a rule to shew cause^a: But, by a general rule of all the courts^b, "in cases where the application for a rule to change the venue is made upon the usual *affidavit* only, the rule shall be absolute in the first instance; and the venue shall not be brought back, except upon an undertaking of the plaintiff, to give material evidence in the county in which the venue was originally laid."

Rule to change venue, in ordinary cases, absolute in first instance.

^a Tidd *Prac.* 9 Ed. 484. 486. 488. & Ad. 389. 8 Bing. 304. 2 Crompt. & J. 608, 9. And as to the practice of changing, and bringing back, the venue in general, see *id.* 601, &c. 197. And for the form of the rule to change the venue thereon, in C. P. and Exchequer, see Append. to Tidd. *Sup.*

^b R. H. 2 W. IV. reg. 1. § 103. 3 Barn. 1833, p. 305.

CHAP. XXV.

Of PAYING MONEY into COURT.

In what cases
formerly al-
lowed, and in
what not.

THE practice of paying money into court was formerly allowed in those cases only where an action was brought upon *contract*, for the recovery of a debt^a, which was either certain, or capable of being ascertained, by mere computation, without leaving any sort of discretion to be exercised by the jury^b. In these cases, when the dispute was not whether any thing, but how much was due to the plaintiff, the defendant might formerly have obtained leave to pay into court any sum of money he thought fit; and the courts would have made a rule, that unless the plaintiff accepted of it, with costs, in discharge of the action, it should be struck out of the declaration, and paid out of court, to the plaintiff or his attorney; and the plaintiff, upon the trial, should not be permitted to give evidence for the sum brought in^c; which rule was accompanied with the general issue, or other plea, to the residue of the demand^d. In an action for *general damages*, upon a contract^e, or for a tort^f, or trespass^g, as a tender could not have been pleaded, so the defendant was not allowed to bring money into court; and it could not have been brought into court, in an action for dilapidations^h: But where the plaintiff, in an action against

^a Com. Dig. *tit. Pleader*, C. 10.

^b *Hallet v. East India Company*, 2 Bur. 1120; and see *Hodges v. Ld. Litchfield*, 9 Bing. 713. 3 Moore & S. 201. 2 Dowl. Rep. 741. S. C.

^c *Berwick v. Symonds*, Say. Rep. 196, 7. *Hallet v. East India Company*, 2 Bur. 1121. *Johnson v. Jebb*, 3 Bur. 1773. Imp. K. B. 10 Ed. 251. R. M. 5 Geo. III. in Scac. Man. Ex. Append. 217, 18; and see Append. to Tidd *Prac.* 9 Ed. Chap. XXV. § 1, 2, 3.

^d *Buck v. Warren*, Barnes, 339. *Hall v. Lane*, *id.* 350; and for the particular cases in which money formerly was, or was not, allowed to be paid into court, and

the practice on paying it in, see Tidd *Prac.* 9 Ed. 619, &c.

^e *Anon.* 1 Vent. 356. *Fullwell v. Hall*, 2 Blac. Rep. 837. *Fail v. Pickford*, 2 Bos. & P. 234. *Strong v. Simpson*, 3 Bos. & P. 14. *Hodges v. Ld. Litchfield*, 9 Bing. 713. 3 Moore & S. 201. S. C.

^f *White v. Woodhouse*, 2 Str. 787. *Squire v. Archer*, *id.* 906. 2 Barnard. K. B. 4. S. C. *Bowles v. Fuller*, 7 Durnf. & E. 335. *Woodgate v. Baldock*, 2 Dowl. Rep. 256. *Groombridge v. Fletcher*, *id.* 353.

^g *Holdfast v. Morris*, 2 Wils. 115.

^h *Salt v. Salt*, 6 Durnf. & E. 47.

his lessee for breaches of covenant, claimed by his particulars of demand a specific sum for dilapidations, the court held that the defendant might have that part of the demand struck out of the declaration, on payment of the sum claimed, and costs ^a.

In *debt*, *covenant*, or other action on a policy of assurance ^b, or in an action for non-residence ^c, the defendant, by act of parliament, is allowed to bring money into court: And, in actions against justices of the peace ^d, officers of the excise ^e, or customs ^f, commissioners of bankrupt ^g, or officers of the army, navy, or marines ^h, for any thing done in the execution of their offices, "in case the defendants shall have neglected to tender any, or shall have tendered insufficient amends before the action brought, they may, by leave of the court, at any time before issue joined, pay into court such sum of money as they shall see fit; whereupon such proceedings, orders, and judgment, shall be made and given in and by such court, as in other actions where the defendant is allowed to pay money into court."¹

By act of
parliament.

In an action of *assumpsit* against a carrier, for not delivering goods, the defendant having advertised that he would not be answerable for any goods beyond the value of 20*l.*, unless they were entered and paid for accordingly, the court of King's Bench allowed him to bring the 20*l.* into court ^k. And, by the common carriers' act, "in all

In action against
carriers.

^a Smith v. King, 3 Moore & S. 799; and see Tidd *Prac.* 9 Ed. 620.

^b Stat. 19 Geo. II. c. 37. §. 7. Johnson v. Jebb, 3 Bur. 1773. Solomon v. Bewicke, 2 Taunt. 317.

^c Stat. 57 Geo. III. c. 99. §. 43.

^d Stat. 24 Geo. II. c. 44. §. 4. And note, this seems to have been the first statute, which allowed money to be brought into court, in an action for *general damages*.

^e Stat. 23 Geo. III. c. 70. §. 33.

^f Stat. 24 Geo. III. sess. 2. c. 47. §. 35. (repealed by 6 Geo. IV. c. 105.) 28 Geo. III. c. 37. §. 28. 6 Geo. IV. c. 108. §. 96. 7 & 8 Geo. IV. c. 53. §. 117.

^g Stat. 6 Geo. IV. c. 16. §. 43.

^h Stat. 6 Geo. IV. c. 108. §. 96.

¹ See also the statutes 13 Geo. III. c. 73. §. 79. 18 Geo. III. c. 84. §. 81. and 3 Geo. IV. c. 126. §. 144. as to bringing money into court, by persons acting under the *general highway*, and *turnpike* acts: And as to bringing it in, by persons acting in pursuance of the laws relative to larceny,

&c. or malicious injuries to property, see the statutes 7 & 8 Geo. IV. c. 29. §. 75. and c. 30. §. 41.

^k Hutton v. Bolton, E. 22 Geo. III. K. B. 1 H. Blac. 299. *in notis.* Beardmore v. Boulton, H. 30 Geo. III. Excheq., but see Fail v. Pickford, 2 Bos. & P. 234.; and as to the liability of carriers, when limited by such advertisement, before the statute 11 Geo. IV. & 1 W. IV. c. 68, see Clay v. Willan, 1 H. Blac. 298. Yate v. Willan, 2 East, 128. Clark v. Gray, 4 Esp. Rep. 177. *per* Ld. Ellenborough, Ch. J. Izett v. Mountain, 4 East, 371. Nicholson v. Willan, 5 East, 507. Levi v. Waterhouse, 1 Price, 280. Evans v. Soule, 2 Maule & S. 1. Batson v. Donovan, 4 Barn. & Ald. 21. Garnett v. Willan, 5 Barn. & Ald. 53. Sleat v. Fagg, *id.* 342. Duff v. Budd, 3 Brod. & B. 177. Rowley v. Horne, 10 Moore, 247. Marsh v. Horne, 5 Barn. & C. 322. and Bradley v. Waterhouse, 1 Moody & M. 154. *per* Ld. Tenterden, Ch. J.; and as to their

In all personal actions, with certain exceptions, by law amendment act.

"actions to be brought against any mail contractor, stage-coach proprietor, or other common carrier for hire, for the loss of, or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court, in the same manner, and with the same effect, as money may be paid into court in any other action." ^a At length, by the provisions of the law amendment act ^b, "it shall be lawful for the defendant in all *personal* actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) by leave of any of the superior courts of law at *Westminster*, where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money, by way of compensation or amends, in such manner, and under such regulations, as to the payment of costs, and the form of the pleading, as the said judges, or any *eight* or more of them, of whom the chief of each of the said courts shall be *three*, shall, by any rules or orders by them to be from time to time made, order and direct." ^c By the above act, the defendant may pay money into court, in many cases where he was not formerly allowed to do so, as in actions for general damages, not being for assault and battery, or false imprisonment, &c. But in an action by landlord against tenant, for not repairing, the court refused to allow the defendant to pay a sum of money into court, by way of compensation and amends, under the above statute; and that the same sum might be received into court, under a plea in the form given by the rule made thereon, and under a plea of tender before action brought ^d.

Rule of court thereon.

In pursuance of the power given by the above act, a statutory rule was made by the judges of all the courts ^e, by which it was ordered,

liability, since the above statute, see *Owen v. Burnett*, 2 *Crompt. & M.* 353. 4 *Tyr. Rep.* 133. *S. C.* *Syms (or Simms) v. Chaplin*, 1 *Nev. & P.* 129. 13 *Leg. Obs.* 27. 44. *S. C.* 1 *Chit. Jun. Pl.* 94, 5. (*p.*); and for the mode of declaring in actions against carriers, see *Yate v. Willan*, 2 *East*, 128. *Clark v. Gray*, 4 *Esp. Rep.* 177. *Marsden v. Gray*, 6 *East*, 564. *S. C.*; and for the form of a plea, founded on the above statute, see 1 *Chit. Jun. Pl.* 284. (3.)

^a 11 *Geo. IV. & 1 W. IV. c.* 68. § 10; and see 2 *Rep. C. L. Com.* 52, &c. 100.

^b 3 & 4 *W. IV. c.* 42. § 21; and see

2 *Rep. C. L. Com.* 52. 97.

^c There is a similar clause in the late act, for improving the practice and proceedings in the court of Common Pleas of the county astatine of *Lancaster*, 4 & 5 *W. IV. c.* 62. § 23.

^d *Searle v. Barrett*, 4 *Nev. & M.* 200. *Dearle v. Barrett*, 2 *Ad. & E.* 82. *Barrett v. Dearle*, 3 *Dowl. Rep.* 13. 9 *Leg. Obs.* 108. 206. *S. C.*

^e *R. Pl. Gen. H.* 4. *W. IV. reg.* 17, 18. 5 *Barn. & Ad. Append. vi.* 10 *Bing.* 468. 2 *Crompt. & M.* 18.

that "when money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the form prescribed by the rule;" which form will be found in the *Appendix*^a. Besides that it was thought much more convenient, as well as more consistent with the real state of facts, that payment of money into court should be put into the shape of a plea, other advantages are gained by putting it into that shape, namely, that the expense of a rule of court, and of proving such rule at the trial, is avoided; that a specific issue will arise as to the sufficiency of the sum; and that the admission of the plaintiff's right of action, and the extent of that admission, will appear on the record; a circumstance which will be found peculiarly beneficial in actions of *trespass* to land^b.

Advantages of pleading payment of money into court.

If it be intended to defend part of the action, and to pay money into court as to other part, the plea or pleas to the part defended should be pleaded first, and the payment into court should be pleaded as to the residue^c. And where, to a declaration for 31*l.* on a bill of exchange, and 100*l.* for money paid, money lent, goods sold, interest, and on an account stated, the defendant pleaded as to the 31*l.*, and as to 12*l.* parcel of the 100*l.* for goods sold, and as to the 100*l.* on the account stated, payment into court of 51*l.* and alleged that the plaintiff had not sustained damages to a greater amount, in respect of so much of those causes of action as in the plea mentioned, it was doubted whether such plea was good, on special demurrer: and it seems that the defendant ought to have shewn distinctly, what portion of the money paid into court was to be applied to the bill of exchange^d. And it has been holden, that a plea of payment of money into court, beginning "as to so much, parcel," &c. and concluding without any prayer of judgment, is bad, on special demurrer^e. Where there are several counts for several causes of action, or several breaches are assigned in *covenant*, the defendant may plead payment into court of one entire sum, in satisfaction of all the counts or breaches^f. But where, upon a declaration consisting of two counts, the defendant paid into court enough to cover the demand in the first, and obtained a verdict on the second, but had omitted to plead the

Decisions thereon.

^a *Append. post*, § 2.

^b 2 Rep. C. L. Com. 54, 5.

^c *Sharman v. Stevenson*, 1 Gale, 74. 5 Tyr. Rep. 564. 3 Dowl. Rep. 709. 2 Crompt. M. & R. 75. 10 Leg. Obs. 315. S. C.

^d *Jourdain v. Johnson*, 2 Crompt. M. & R. 564. 5 Tyr. Rep. 524. 1 Gale, 312. 4 Dowl. Rep. 534. S. C.; and see *Marshall v. Whiteside*, 1 Meeson & W. 191, 2.

1 Tyr. & G. 485. 4 Dowl. Rep. 770. S. C.

^e *Sharman v. Stevenson*, 1 Gale, 74; and see *Porter v. Izat*, 1 Tyr. & G. 639.

^f *Marshall v. Whiteside*, 1 Meeson & W. 188. 1 Tyr. & G. 485. 4 Dowl. Rep. 766. S. C.; and see *Mee v. Tomlinson*, 5 Nev. & M. 624. 1 Har. & W. 614. S. C. *Lorymer v. Vizeu*, 3 Bing. N. R. 222.

payment, as required by the new rules, the court held that he was not entitled to costs^a.

Rule for paying money into court, how formerly drawn up.

The rule for paying money into court in the King's Bench, was formerly drawn up by the clerk of the rules in term time, or within a week after, on a motion paper signed by counsel; but after a week from the end of the term, there must have been a judge's order for drawing up the rule, which was granted of course, without a summons. In the Common Pleas, if the sum were under *five* pounds, it might have been paid in on a side bar or treasury rule, which was granted of course by the secondaries; but if it amounted to that sum or upwards, a serjeant's hand was necessary for obtaining the rule; and after a week from the end of the term, there must also have been a judge's order for drawing it up^b. But, by a general rule of all the courts^c, in all cases in which money might be paid into court, leave to pay it in might have been obtained by a side bar rule.

Practice now governed by law amendment act. Rule of court thereon.

The practice of paying money into court, however, is now governed by the law amendment act, and the statutory rules made thereon; by one of which rules^d it is ordered, that "no rule or judge's order to pay money into court shall be necessary, except under the 3 & 4 W. IV. c. 42. § 21.; but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand." By this rule it is unnecessary to have any rule or order for paying money into court, in cases where it was allowed before the law amendment act. In such cases it is to be paid to the proper officer, as a matter of course, without any rule or order for that purpose, in like manner as upon a plea of tender^e. But in cases where the payment of money into court was first allowed by the law amendment act, as in actions for general damages, &c. a rule of court or judge's order must be obtained, for leave to pay it in: And it should be remembered, that the payment of money into court must in all cases be pleaded, even though it be paid in under a rule of court or judge's order.

Effect of such rule.

To whom, and how money is paid.

In the King's Bench, the money is paid to the signer of the writs, who acts in this instance as deputy to the Master^f; and will give a receipt for the money, in the margin of the plea, on being paid 20s. for every 100*l.* and so in proportion for every greater or less sum, exceeding 10*l.* and 2*s.* for every sum under 10*l.* besides 2*s.* 4*d.* for the

^a *Adlard v. Booth*, 1 Bing. N. R. 693. 183.

1 Scott, 644. S. C.

^b *Tidd Prac.* 9 Ed. 484, 5. 622.

^c R. H. 2 W. IV. reg. 1. § 55. 3 Barn. & Ad. 381. 8 Bing. 295. 2 Crompt. & J.

^d R. Pl. Gen. H. 4 W. IV. reg. 18.

5 Barn. & Ad. Append. vi. 10 Bing. 468.

^e *Tidd Sup.* 1830, p. 18.

^f 1 Crompt. Pr. 3 Ed. 142.

receipt^a. In the Common Pleas, the money is paid to a clerk in the prothonotaries' office, who writes a receipt in the margin of the plea, on being paid one penny in the pound, and 1*s.* 4*d.* for the receipt. In the Exchequer, it is paid to a Master and prothonotary of the court^b.

When money was paid into court, if the plaintiff were willing to accept it, with costs, in discharge of the action, and they were not paid, he might formerly have proceeded in the action; and proof of the rule to pay money into court, would of itself have entitled him to a verdict, and nominal damages^c: Or, in the Common Pleas and Exchequer, the plaintiff, after demanding the costs, might have had an attachment for the non-payment of them; or, in these courts, he might have proceeded in the action, without a previous demand of the costs^d. In the King's Bench, however, the plaintiff must have proceeded in the action, if they were not paid, and could not have had an attachment^e; for the rule in that court was conditional, and not, as in the Common Pleas^f, obligatory upon the defendant to pay the costs: But, by a general rule of all the courts^g, on payment of money into court, the defendant was required to undertake by the rule, to pay the costs; and in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for *nominal* damages. And now, by a subsequent rule of all the courts^h, made in pursuance of the law amendment actⁱ, "the plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same, by accepting the sum so paid into court, in full satisfaction and discharge of the cause of action, in respect of which it has been paid in; and he shall be at liberty, in that case, to tax his costs of suit, and in case of non-payment thereof, within *forty-eight* hours, to sign judgment for his costs of suit so taxed: or the plaintiff may reply that he has sustained damages, (or that the defendant is indebted to him, as the case may be,) to a greater amount than the said sum^k; and in the event of

Proceedings formerly had, when money was paid into court.

Replication to plea of, and proceedings thereon.

^a R. H. 5 Jac. I. K. B. ; and see Haines v. Nairn, 2 Dowl. Rep. 43.

^b Dax Ex. Pr. 1 Ed. 67.

^c Horsburgh v. Orme, 1 Campb. 558. *n.* per Ld. Ellenborough, Ch. J.

^d Smith v. Smith, 2 New Rep. C. P. 473. Plummer v. Savage, 6 Price, 126. Smith v. Battersby, 7 Price, 674.

^e Hand v. Lady Dinely, 2 Str. 1220. Stokes v. Woodeson, 7 Durnf. & E. 6.

^f Scarrall v. Horton, Barnes, 283. Pr. Reg. 259. S. C. Fricker v. Eastman, 11

East, 319.

^g R. H. 2 W. IV. reg. I. § 56. 3 Barn. & Ad. 381. 8 Bing. 295. 2 Crompt. & J. 183.

^h R. Pl. H. 4 W. IV. reg. 19. 5 Barn. & Ad. Append. vi, vii. 10 Bing. 468, 9. 2 Crompt. & M. 19.

ⁱ 3 & 4 W. IV. c. 42. § 21.

^k For the form of a replication to a plea of payment of money into court, see 6 Car. & P. 712. (a.) 1 Chit. Pl. 371, 2; and see Proctor v. Nicholson, 7 Car. & P. 67.

an issue thereon being found for the defendant, the defendant shall be entitled to judgment, and his costs of suit."

Decisions there-
on.

If the defendant pay money into court, as to part of the plaintiff's demand, and plead *non assumpsit*, or *nunquam indebitatus*, or a set off, or other plea, as to the residue, the plaintiff may take the money out of court, in satisfaction of the cause of action in respect of which it was paid in, and take issue, and proceed to trial, on the other plea: But where, to a declaration in *assumpsit*, brought to recover the sum of 30*l.* the defendant pleaded, first, to the whole declaration, payment of the sum of 27*l.* 4*s.* 4*d.* into court, and that the plaintiff had not sustained damages to a greater amount; secondly, except as to 27*l.* 4*s.* 4*d.* *non assumpsit*; thirdly, payment of the sum of 10*l.* before action; and fourthly, as to all, except 27*l.* 4*s.* 4*d.*, a set off; to which the plaintiff replied that he accepted the sum paid into court, and was satisfied; the court held, that the defendant was not justified in signing judgment of *non pros*, for want of a replication to the second, third, and fourth pleas ^a. In an action on the case for an injury to the plaintiff's reversionary interest in a wharf, by breaking a wall, the defendant having pleaded not guilty to the whole declaration, and a special plea of justification, and the plaintiff having new assigned, the defendant paid money into court, which was accepted in satisfaction of the cause of action, the court held that the plaintiff was entitled to the costs of the writ, and the defendant to all other costs prior to the new assignment ^b. In an action for *dilapidations*, the defendant having paid money into court, the plaintiff replied further damage; and having subsequently given a peremptory undertaking, pursuant to which however he did not go to trial, the court permitted a rule for judgment as in case of a nonsuit to be discharged, on his amending his replication, by accepting the money in satisfaction of the cause of action, and paying the defendant's costs, incurred since the payment of the money into court ^c. In an action against a *carrier*, for not delivering goods at a specified time, the defendant pleaded payment of money into court, and the plaintiff replied that he had sustained more damages; the amount paid in was the cost price of the goods, the defendant having offered them in *specie* to the plaintiff two days only after they ought to have been delivered; but the plaintiff proved that he had sustained inconvenience and loss, by not having the goods de-

Jourdain v. Johnson, 2 Crompt. M. & R. 564. 5 Tyr. Rep. 524. 1 Gale, 312. 4 Dowl. Rep. 534. S. C. Marshall v. White-side, 1 Meeson & W. 191, 2.

^a Coates v. Stevens, 2 Crompt. M. & R.

118. 5 Tyr. Rep. 764. 3 Dowl. Rep. 784. 1 Gale, 75. S. C.

^b Griffiths v. Jones, 5 Dowl. Rep. 167.

1 Meeson & W. 731. S. C.

^c Kelly v. Flint, 13 Leg. Obs. 94.

livered at a proper time ; the jury, however, found for the defendant, and the court refused to set aside the verdict^a.

The defendant is not, it seems, precluded from the benefit of the court of requests' acts, by paying money into court^b. But where, in an action to recover a sum of 8*l.* 2*s.* (as claimed by the particulars of demand,) the defendant paid 1*l.* 18*s.* into court, under the rule of *Hil. T.* 4 *W. IV. reg.* 19, which the plaintiff took out, in full satisfaction of the action ; the cause of action arose, and the parties lived within the jurisdiction of the county court of *Cardiganshire* ; and by order of a judge, the defendant was allowed to enter a suggestion on the roll of these facts, and that the action was brought for a sum under 40*s.*, and further proceedings were stayed, with a view of depriving the plaintiff of his costs ; the court set aside the order, on account of the form of the rule for paying money into court, the lateness of the application, and it not clearly appearing that the action was brought for less than 40*s.*^c

On court of requests' acts.

In the King's Bench, where the defendants in several actions on a policy of insurance, paid money into court, which the plaintiff took out, without taxing costs at that time, and afterwards the defendants entered into the common consolidation rule, and the plaintiff was nonsuited in the action that was tried ; the court held that the latter was not entitled to costs in any of the actions, up to the time of paying money into court^d. But, in the Common Pleas, where there was a consolidation rule, and money paid into court, although the cause tried followed the general practice, and the defendant, if he succeeded, was entitled to the whole costs of that cause, yet the plaintiff was entitled to the costs of the short causes, up to the time when the money was paid in^e. And, accordingly, by a general rule of all the courts^f, "where money is paid into court in several actions, which "are consolidated, and the plaintiff, without taxing costs, proceeds to "trial on one, and fails, he shall be entitled to costs on the others, up "to the time of paying money into court."

Costs, where money is paid into court, in actions which are consolidated.

^a *Evans v. Lewis*, 3 Dowl. Rep. 819. 372.
10 Leg. Obs. 332. S. C.

^b *Turner v. Barnard*, 5 Dowl. Rep. 170.
1 Meeson & W. 580. S. C.

^c *Farrent (or Tarrant) v. Morgan*, 3 Dowl. Rep. 792. 2 Crompt. M. & R. 252. 5 Tyr. Rep. 790. 1 Gale, 156. 10 Leg. Obs. 221, 2. S. C.

^d *Burstall v. Horner*, 7 Durnf. & E.

^e *Twemlow v. Brock*, 2 Taunt. 361 ; and see *Wilton v. Place*, 2 Bos. & P. 56. *Muller v. Hartshorne*, 3 Bos. & P. 558. accord.

^f *R. H.* 2 *W. IV. reg.* I. § 104. 3 Barn. & Ad. 389. 8 Bing. 304. 2 Crompt. & J. 197.

CHAP. XXVI.

Of PLEAS in ABATEMENT, &c.

Non-joinder of parties, in actions upon contracts.

In actions for wrongs.

Against common carriers.

IN actions upon *contracts*, when there are *several* parties, the action should be brought by or against all of them, if living^a; or, if some are dead, by or against the survivors^b: and if an action be brought by one of several parties, on a joint contract made with all of them, the non-joinder may be pleaded in bar^c. But if an action be brought, upon a joint contract, against one of several partners, he can only plead in abatement; though the plaintiff knew, and even contracted with the other partners^d. In actions for *wrongs*, as they are of a joint and several nature, the plaintiff may proceed against all or any of the parties who committed them; and it is no plea in abatement^e, or ground of nonsuit^f, that there are other parties not named. In an action on the *case*, therefore, against a common carrier, for the loss of goods, or for not safely carrying a passenger, the defendant cannot plead in abatement the non-joinder of a copartner^g. And by the common carriers' act, 11 Geo. IV. & 1 W. IV. c. 68. § 5, "any one or more of several mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued by his, her or their name or names only; and no action or suit commenced to recover damages, for loss or injury to any parcel, package or person, shall abate for the want of joining any co-proprietor or co-

^a 1 Wms. Saund. 5 Ed. 291. b. (4.)

^b 2 Wms. Saund. 5 Ed. 121. c. (1.) and see the cases referred to in Tidd Prac. 9 Ed. 6.

^c Post, Chap. XXVII. 1 Chit. Jun. Pl. 361. (d.); and for the form of such plea, see *id.* 361, 2.

^d Darwent v. Walton, 2 Atk. 510. Rice v. Shute, 5 Bur. 2611. 2 Blac. Rep. 695. S. C. Abbot v. Smith, *id.* 947; and see Mitchell v. Tarbutt, 5 Durnf. & E. 649. 1 Wms. Saund. 5 Ed. 291. c.d. Tidd Prac. 9 Ed. 6. And for the forms of pleas in abate-

ment of the nonjoinder of a joint contractor, and replications thereto, see 1 Chit. Jun. Pl. 197, &c. 442.

^e Tidd Prac. 9 Ed. 635.

^f Ansell v. Waterhouse, 6 Maule & S. 385. 2 Chit. R. 1. S. C.; and see Mitchell v. Tarbutt, 5 Durnf. & E. 649. Govett v. Radnidge, 3 East, 62. Bretherton v. Wood, 6 Moore, 141. 3 Brod. & B. 54. 9 Price, 408. S. C.; but see Buddle v. Wilson, 6 Durnf. & E. 369. Powell v. Layton, 2 New Rep. C. P. 365. *semb. contra*; and see Tidd Prac. 9 Ed. 635, 6.

"partner in any mail, stage-coach, or other public conveyance, by land
"for hire."

Also, by the late act for the further amendment of the law^a, &c.
"no plea in abatement, for the non-joinder of any person as a co-
"defendant, shall be allowed in any court of common law, unless it
"shall be stated in such plea, that such person is resident within the
"jurisdiction of the court; and unless the place of residence of such
"person shall be stated, with convenient certainty, in an *affidavit*
"verifying such plea."^b And it having been holden that joint con-
tractors must all be sued, though one of them had become bankrupt,
and obtained his certificate^c, or if not, that the parties sued might
plead in abatement^c; it was further enacted, by the same statute^d,
that "to any plea in abatement, in any court of law, of the non-
"joinder of another person, the plaintiff may reply that such person
"has been discharged by bankruptcy and certificate, or under an
"act for the relief of insolvent debtors."

Plea in abate-
ment, for non-
joinder of a per-
son as co-de-
fendant.

Replication
thereto, of a
discharge by
certificate, &c.

By Lord *Tenterden's* act^e, "if any defendant or defendants, in
"any action on any simple contract, shall plead any matter in abate-
"ment, to the effect that any other person or persons ought to be
"jointly sued, and issue be joined on such plea, and it shall appear
"at the trial, that the action could not, by reason of the therein re-
"cited acts^f, or that act, or of either of them, be maintained against
"the other person or persons named in such plea, or any of them,
"the issue joined on such plea shall be found against the party plead-
"ing the same."

Effect of such
plea, by *Ld.*
Tenterden's
act.

And, by the law amendment act^g, "in all cases in which, after such
"plea in abatement, the plaintiff shall, without having proceeded to
"trial upon an issue thereon, commence another action against the
"defendant or defendants in the action in which such plea in abate-
"ment shall have been pleaded, and the person or persons named in
"such plea in abatement as joint contractors^h, if it shall appear, by
"the pleadings in such subsequent action, or on the evidence at the
"trial thereof, that all the original defendants are liable, but that

Where subse-
quent proceed-
ings are had
against the per-
sons named
therein.

^a 3 & 4 W. IV. c. 42. § 8; and see 3
Rep. C. L. Com. 10, 11. 72.

^b For the form of an *affidavit* in support
of a plea of non-joinder, before the above
statute, see *Dobbin v. Wilson*, 3 Nev. &
M. 260.

^c *Bovill v. Wood*, 2 Maule & S. 23;
and see *Noke v. Ingham*, 1 Wils. 89. *Haw-
kins v. Ramsbottom*, 6 Taunt. 179. *Tidd*

Prac. 9 Ed. 682.

^d § 9.

^e 9 Geo. IV. c. 14. § 2.

^f 21 Jac. I. c. 16. and Irish act, 10 Car.
I. sess. 2. c. 6.

^g 3 & 4 W. IV. c. 42. § 10.

^h For the form of the commencement of
the declaration in this case, see *Append.*
post, § 1.

"one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to a judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants, who shall appear to be liable; and every defendant who is not so liable, shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person: Provided, that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial, to adduce evidence of the liability of the defendants named by him in such plea in abatement."

Misnomer not
pleadable in
abatement.

Before the late act for the further amendment of the law^a, &c. if the plaintiff had declared against the defendant by a wrong name, the latter, if not estopped, might have pleaded the *misnomer* in abatement^a: But now, by the above act^b, "no plea in abatement for a *misnomer*, shall be allowed in any *personal* action; but in all cases in which a *misnomer* would, but for that act, have been by law pleadable in abatement in such action, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an *affidavit* of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit." It has been made a question, whether the words of this statute are peremptory^c: and where a judge had made an order for amending a *misnomer* in a declaration, on payment of costs, the court granted a rule to shew cause why the judge's order should not be amended, and for a stay of proceedings in the mean time^c.

Parol demurrer.

Formerly, when an infant was sued as heir, on the obligation of his ancestor, though the defendant could not have pleaded in abatement of the suit, the *parol* might have demurred, or proceedings thereon been stayed, till he came of age^d. But now, by the statute 11 Geo. IV. & 1 W. IV. c. 47. § 10, "where any action, suit or

Abolished, by
stat. 11 Geo.
IV. & 1 W.
IV. c. 47.

^a 3 & 4 W. IV. c. 42; and see 3 Rep. C. L. Com. 22, 3, 75, 6. Tidd *Prac.* 9 Ed. 636: And as to the *misnomer* of parties, and how taken advantage of, and when and how a mistake in their names was cured, and when not, see *id.* 447, 8, 9. Finch v. Cocken, 2 Crompt. M. & R. 196. 3 Dowl.

Rep. 678. 1 Gale, 130. 5 Tyr. Rep. 774. 10 Leg. Obs. 317, 18. S. C.

^b § 11. *Ante*, 67.

^c Henekey v. Earl Strathmore, 13 Leg. Obs. 45.

^d Rast. Ent. 360. (b.) 362. (a.) 379, 80. Bro. Red. 195.

" other proceeding, for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any *infant* under the age of *twenty-one* years, either alone or together with any other person or persons, the *parol* shall not demur; but such action, suit or other proceeding, shall be prosecuted and carried on in the same manner, and as effectually, as any action or suit could, before the passing of that act, be carried on or prosecuted, by or against any infant, where, according to law, the *parol* did not demur."

Pleas to the jurisdiction of the court^a, and in abatement^b, must formerly have been pleaded within *four* days *inclusive*^c after the delivery, or filing and notice, of the declaration^d; unless the declaration were delivered or filed after term, or so late in term, that the defendant was not bound to plead to it in that term; in both which cases the defendant, in the King's Bench, might, within the first *four* days *inclusive* of the next term, have pleaded to the jurisdiction of the court, or in abatement, as of the preceding term^e. In the Common Pleas, however, the defendant could not have pleaded in abatement, within the first *four* days of the next term, without a special imparlance, which was granted by the prothonotaries^f. Afterwards, by a general rule of all the courts^g, "if the declaration were filed or delivered so late, that the defendant was not bound to plead until the next term, the defendant might have pleaded as of the preceding term, within the first *four* days of the next term, any plea to the jurisdiction, or in abatement, or a tender, or any other similar plea." And now, as proceedings, we have seen^h, may be had on writs, except at certain times, in *vacation* as well as in term, pleas to the jurisdiction, or in abatement, &c. must be pleaded, except at those times, in *four* days *inclusive* after the delivery, or filing and notice of the declaration.

Time for pleading to the jurisdiction, or in abatement, &c.

^a Tidd *Prac.* 9 Ed. 638. (p.)

^b *Id.* (q.)

^c Jennings v. Webb, 1 Durnf. & E. 277. Harbord v. Perigal, 5 Durnf. & E. 210.

^d Tidd *Prac.* 9 Ed. 639. (b.)

^e Anon. 1 Salk. 367. Gilb. K. B. 344, 5; and see Holme v. Dalby, 3 Barn. & Ald. 259. 1 Chit. R. 704. S. C.

^f Threlkeld v. Goodfellow, Pr. Reg. 1. Cas. Pr. C. P. 78. Barnes, 224. S. C. Napper v. Biddle, *id.* 334. S. P.; and see Tidd *Prac.* 9 Ed. 463. 638, 9.

^g R. H. 2 W. IV. reg. I. § 45. 3 Barn. & Ad. 380. 8 Bing. 294. 2 Crompt. & J. 180.

^h *Ante*, 132, 3.

CHAP. XXVII.

Of PLEAS in BAR, PLEADING SEVERAL MATTERS, and SIGNING and DELIVERING PLEAS, &c.

Pleas in bar,
what.

In denial, or
confession and
avoidance, &c.

How treated of.

PLEAS in bar are calculated to shew, either that the plaintiff never had any cause of action; or, if he had, that it was discharged by some subsequent matter: and they are commonly said to be in *denial*, or *confession* and *avoidance* of the cause of action; or they conclude the plaintiff by matter of *estoppel* ^a.

In treating of pleas in bar, it is intended to consider, first, the several grounds of defence, and what pleas adapted thereto may be pleaded, in actions upon *contracts*, and for *wrongs* independently of contract: Secondly, the power of the judges to make alterations in the mode of pleading, &c.; and the rules made by them in pursuance thereof: Thirdly, what must now, since the making of the above rules, be proved by the *plaintiff* on the general issue, or common plea in denial of the *contract* or *wrong* stated in the declaration: Fourthly, what might have been formerly, and may now be given in evidence thereon by the *defendant*, or must be pleaded specially, in actions upon contracts, and for wrongs: Fifthly, in what cases the special matter may be given in evidence under the general issue, by act of parliament: Sixthly, the pleas in actions by and against *bankrupts* or *insolvent* debtors, and their respective *assignees*; or by and against *executors* or *administrators*, *heirs* or *devisees*: Seventhly, the title, commencement, body, and conclusion of pleas: Eighthly, in what cases the defendant might formerly have pleaded, and is now allowed to plead several matters: and lastly, the practice as regards the signing, delivering, filing, adding, amending, waiving, abiding by, striking out, or setting aside pleas, &c.

In actions upon
contracts.

In actions upon *contracts*, pleas in bar are in *denial* of the contract, or other matters stated in the declaration, or in *confession* and *avoidance* of the contract, at common law or by statute; or, admitting the validity of the contract, they are in avoidance of the defendant's

^a 5 Hen. VII. 14. *pl.* 4. Zouch *v.* and see Tidd *Prac.* 9 Ed. 643. 1 Chit. Barnfield, 1 Leon. 77. Anon. Sav. 86; *Pl.* 413.

liability thereon; or, supposing him to have been once liable, they are in *discharge* of the cause of action, by reason of some subsequent or collateral matter. The common pleas in denial are, in *assumpsit*, *In denial.* *non assumpsit*^a; in *covenant*, or *debt* on specialty, *non est factum*^b; and in *debt* or *scire facias* on a judgment or recognizance, *nul tiel record*^c. These pleas were formerly called *general* issues, and may still, it is conceived, not improperly be so designated, to distinguish them from *special* pleas in denial, or confession and avoidance; although the effect of them is considerably narrowed by the late statutory rules of pleading. In *debt* on simple contract, the general issue was formerly *nil debet*^d, that the defendant did not owe the sum demanded to the plaintiff; but this plea was abolished by one of the late statutory rules^e, which will be noticed hereafter^f. Besides the common pleas in *denial*, there are others which may be pleaded in actions upon contracts, denying some material fact stated in the declaration, by way of inducement to the contract^g, or averred by the plaintiff to entitle him to its performance^h, or the breach of itⁱ.

Pleas in *confession* and *avoidance* of the contract are, that it was *void* or *voidable*, at common law or by statute. Pleas in *avoidance* of the contract at common law are first, that it was void for want of sufficient *consideration*^k, when not under seal; secondly, that the parties

In avoidance of contract, at common law.

^a 1 Chit. *Jur.* Pl. 205. (2, 3, 4.) 294. (1.) 295. (2.) 312. (1.)

^b 1 Chit. *Jur.* Pl. 443. (4.) 444. (5, 6.)

^c 1 Chit. *Jur.* Pl. 455. (1.) and for the forms of *general issues*, in different actions, see Steph. Pl. 3 Ed. 155, &c.

^d Append. to Tidd *Prac.* 9 Ed. Ch. XXVII. § 3.

^e R. Pl. H. 4 W. IV. *Covenant and Debt*, reg. II. § 2, 3. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 21, 2.

^f *Post*, 360.

^g 1 Chit. *Jur.* Pl. 283. (1.) 304. (1.) 343. (10.) 447. (1, 2.)

^h *Id.* 217. (1. 3.) 245. 253, &c. 304. (2.) 309. (3.) 324. (2, 3, 5.) 325. (6.) 327. (11.) 329. (18.) 344. (14.) 372. (1.)

ⁱ *Id.* 217. (1, 2, 3.) 246. (1.) 253. (2.) 312. (2.) 343. (11, 12, 13.) 344. (15.)

^k As to the *consideration* necessary for supporting a contract without deed, see Com. Dig. tit. Action upon the Case upon *Assumpsit*, B. 1, &c. 2 Chit. *Blac. Com.*

444, &c. 1 Fonbl. *Treat. Eq.* 2 Ed. 335, &c. Powell on Contracts, 1 V. 330, &c. Comyn on Contracts, 2 Ed. 7, &c. 1 Chit. Pl. 4 Ed. 262, &c. 3 Chit. *Com. Law*, 63, &c. Lawes on Pleading, Chap. III. 1 Sel. *Nl. Pri.* 5 Ed. 45, &c.; whether an agreement in writing is binding, without consideration, see *Pillans v. Van Mierop*, 3 Bur. 1670. *Rann v. Hughes*, 7 Durnf. & E. 350. (a.) Fonbl. *Treat. Eq.* 335, &c.; and whether a moral obligation is sufficient to support an express *assumpsit*, see *Atkins v. Hill*, Cowp. 288. *Hawkes v. Saunders*, *id.* 290. *Trueman v. Fenton*, *Id.* 544. *Barnes v. Hedley*, 2 Taunt. 184. *Lee v. Muggeridge*, 5 Taunt. 36. *Wells v. Horton*, 2 Car. & P. 383. *Sengo v. Deane*, 1 Moore & P. 227. 4 Bing. 559. 3 Car. & P. 170. S. C. 1 Sel. *Nl. Pri.* 5 Ed. 56. Tidd *Prac.* 9 Ed. 436; but see 3 Bos. & P. 249. (a.) *Littlefield v. Shee*, 2 Barn. & Ad. 811.

thereto were legally incapable of contracting, by reason of *coverture*^a, *lunacy*^b, *idiocy*^c, *intoxication*^d, or *alien enemy* at the time of the contract^e; secondly, that the contract was *void*, on the ground of *fraud* or *covin*^f, or, in actions on policies of assurance, for unseaworthiness^g, misrepresentation^h, or concealment of material factsⁱ, &c.; thirdly, that it was against *public policy*, as being in restraint of marriage^k, or trade^l; for *champerty*^m, *maintenance* of suitsⁿ, or suppressing prosecutions for felony^o, &c.; or founded on a smuggling contract^p, or wager relating to the amount of hop duties^q, or the receipt tax, or other branch of the public revenue^r; fourthly, that the contract

^a Com. Dig. tit. *Pleader*, 2 W. 21. 3 Chit. Pl. 5 Ed. 907. a. 910. 1 Chit. *Jur.* Pl. 290. 452.

^b *Yates v. Boen*, 2 Str. 1104; and see *Baxter v. Earl of Portsmouth*, 5 Barn. & C. 170. 7 Dowl. & R. 614. S. C.

^c *Dennis v. Dennis*, 2 Wms. Saund. 332.

^d *Bul. Ni. Pri.* 172. *Pitt v. Smith*, 3 Campb. 33. *per* Ld. *Ellenborough*, Ch. J. *Brandon v. Ord*, 3 Car. & P. 440. *per Best*, Ch. J.; and see *Cook v. Clayworth*, 18 Vez. 12. *Butler v. Mulinhill*, 1 Bligh, 137. Morg. Pr. 238.

^e Co. Lit. 129. b. Com. Dig. tit. *Abatement*, E. 4. tit. *Alien*, C. 5. 1 Chit. Pl. 419, 20. 3 Chit. Pl. 5 Ed. 910, 11; and see *Brandon v. Nesbitt*, 6 Durnf. & E. 23. *Bristow v. Towers*, *id.* 35. *Willison v. Patteson*, 7 Taunt. 439. 1 Moore, 133. S. C.; but see *Van Brynen v. Wilson*, 9 East, 321.

^f 3 Chit. Pl. 5 Ed. 963. 1 Chit. *Jur.* Pl. 304. 321. 333. 453. *Edwards v. Brown*, 1 Crompt. & J. 307. 1 Tyr. Rep. 196. S. C. *Stevens v. Webb*, 7 Car. & P. 60. *Connop v. Holmes*, 1 Tyr. & G. 65. 4 Dowl. Rep. 451. S. C. *Tabram v. Warren*, 1 Tyr. & G. 153. 4 Dowl. Rep. 545. S. C.

^g 1 Chit. *Jur.* Pl. 325.

^h 1 Chit. *Jur.* Pl. 328. (14.) 329. (19.) 331. (20, 21.) *Wainwright v. Bland*, 1 Meeson & W. 32. 1 Tyr. & G. 417. S. C. And as to the effect of misrepresentations in contracts, see *Flight v. Booth*, 1 Scott,

190. 201. 1 Bing. N. R. 370. S. C. *Rosc. Law Tracts*, 16.

ⁱ 1 Chit. *Jur.* Pl. 332, 3; and see *Wainwright v. Bland*, 1 Meeson & W. 32. 1 Tyr. & G. 417. S. C.

^k *Low v. Peers*, 4 Bur. 2225. *Lofft*, 345. S. C. *Hartley v. Rice*, 10 East, 22.

^l *Horner v. Graves*, 7 Bing. 735. 5 Moore & P. 768. S. C. *Young v. Timmins*, 1 Crompt. & J. 331. 1 Tyr. Rep. 226. S. C.; and see *Mitchell v. Reynolds*, 1 P. Wms. 181.

^m *Post*, 347. (b.)

ⁿ *Bell v. Smith*, 5 Barn. & C. 194. 7 Dowl. & R. 855. S. C. *Potts v. Sparrow*, 3 Dowl. Rep. 630. 1 Scott, 578. 1 Bing. N. R. 594. 1 Hodges, 135. S. C. *In re Masters*, 1 Har. & W. 348. 4 Dowl. Rep. 18. 10 Leg. Obs. 495. 6. S. C.; but see *Williamson v. Henley*, 3 Moore & P. 731. 6 Bing. 299. S. C.

^o *Collins v. Blantern*, 2 Wils. 341. 347. *Poole v. Bousfield*, 1 Campb. 55. *Harding v. Cooper*, 1 Stark. *Ni. Pri.* 467; and see *Prole v. Wiggins*, 3 Bing. N. R. 230.

^p *Clarke v. Shee*, Cowp. 334. *Biggs v. Lawrence*, 3 Durnf. & E. 454. *Clugas v. Penaluna*, 4 Durnf. & E. 466. *Waymell v. Reed*, 5 Durnf. & E. 599. *Bernard v. Reed*, 1 Esp. Rep. 91. S. C. *Pellecat v. Angel*, 1 Gale, 167. 2 Crompt. M. & R. 311. S. C.

^q *Atherfold v. Beard*, 2 Durnf. & E. 610. *Shirley v. Sankey*, 2 Bos. & P. 130.

^r 2 Sel. *Ni. Pri.* 5 Ed. 1348. 1 Chit. *Jur.* Pl. 219.

was *contra bonos mores*, as that it was entered into by the parties with a view to their future cohabitation ^a, or, if not by deed, in respect of their past cohabitation ^b, or for lodgings let ^c, or articles of dress ^d supplied, for the purposes of prostitution; or respecting immoral publications ^e, &c. or wagers that tend to the introduction of indecent evidence ^f, or wantonly affect the interest or feelings of third persons ^g. The grounds on which contracts are considered as *voidable* at common law, are *infancy*^h, *duress* of imprisonment ^h, or *per minas*ⁱ.

Pleas in *avoidance* of the contract by *statute* are, that it was void or By statute. voidable by the 23 *Hen. VI. c. 9.*^k & 29 *Eliz. c. 4.*^l for the *extortion* of sheriffs, &c.; by the 5 & 6 *Edw. VI. c. 16.* respecting the sale of *offices*^m; by the 31 *Eliz. c. 6.* for *simony*ⁿ; by the statute of *frauds*, 29 *Car. II. c. 3. § 17.* as not being in *writing*^o; by the *Lord's day act*, 29 *Car. II. c. 7.* as being made on *Sunday*^p; by the 9 *Ann. c. 14.* for

^a *Walker v. Perkins*, 3 *Bur.* 1568. 1 *Blac. Rep.* 517. *S. C.* *James v. Hoskins*, *Tidd Prac.* 9 *Ed.* 547. *Binnington v. Wallis*, 4 *Barn. & Ald.* 650. *Friend v. Harrison*, 2 *Car. & P.* 584. *per Best*, *Ch. J.*

^b *Binnington v. Wallis*, 4 *Barn. & Ald.* 650.

^c *Girarday v. Richardson*, 1 *Esp. Rep.* 13. *Jennings v. Throgmorton*, *Ry. & Mo.* 251. *Appleton v. Campbell*, 2 *Car. & P.* 347. *per Abbott*, *Ch. J.*

^d *Bowry v. Bennett*, 1 *Campb.* 348. *per Id. Ellenborough*, *Ch. J.*

^e *Forbes v. Johnes*, 4 *Esp. Rep.* 97. *per Lawrence*, *J.* *Stockdale v. Onwhyn*, 2 *Car. & P.* 163. 5 *Barn. & C.* 173. 7 *Dowl. & R.* 625. *S. C.* *Poplet v. Stockdale*, *Ry. & Mo.* 337. 2 *Car. & P.* 198. *S. C. per Best*, *Ch. J.* 1 *Chit. Jun. Pl.* 412.

^f *Da Costa v. Jones*, *Cowp.* 729. *Powell on Contracts*, 1 *Ed.* 232, 3. And for the subjects of contracts or agreements in general, see *id.* 162, &c.

^g *Com. Dig. tit. Pleader*, 2 *G. 3.* 2 *W.* 22. 3 *Chit. Pl. 5 Ed.* 909. 5. 965. 1 *Chit. Jun. Pl.* 314. 455.

^h *Com. Dig. tit. Pleader*, 2 *W.* 19. 3

Chit. Pl. 5 Ed. 965.

ⁱ *Com. Dig. tit. Pleader*, 2 *W.* 20. 3 *Chit. Pl. 5 Ed.* 964.

^k *Com. Dig. tit. Pleader*, 2 *W.* 25. *Chit. Stat.* 87. 3 *Chit. Pl.* 981.

^l *Chit. Stat.* 332.

^m *Com. Dig. tit. Pleader*, 2 *W.* 27. *Chit. Stat.* 740.

ⁿ *Chit. Stat.* 151.

^o *Chit. Stat.* 366. 3 *Chit. Pl.* 909. 1 *Chit. Jun. Pl.* 291. 305. 308. 336. 376. 402. 454. 7 *Car. & P.* 288. (a.); and see *Taylor v. Hillary*, 1 *Crompt. M. & R.* 741. 5 *Tyr. Rep.* 373. 1 *Gale*, 22. 3 *Dowl. Rep.* 461. *S. C.* *Clancy v. Piggott*, 4 *Nev. & M.* 496. 2 *Ad. & E.* 473. *S. C.* *Hawes v. Armstrong*, 1 *Bing. N. R.* 761. 1 *Scott*, 661. 1 *Hodges*, 179. *S. C.* *Andrews v. Smith*, 2 *Crompt. M. & R.* 627. 1 *Gale*, 335. 1 *Tyr. & G.* 173. *S. C.* *Smith v. Dixon*, 4 *Dowl. Rep.* 571. 1 *Har. & W.* 668. 11 *Leg. Obs.* 388. *S. C.* *Rosc. Law Tracts*, p. 35.

^p *Chit. Stat.* 1037, 8. 1 *Chit. Jun. Pl.* 385; and see *Peate v. Dicken*, (or *Dickens*), 1 *Crompt. M. & R.* 422. 5 *Tyr. Rep.* 116. 3 *Dowl. Rep.* 171. *S. C.*

gaming^a; by the 12 Ann, stat. 2. c. 16. for *usury*^b; by the *bribery act*, 2 Geo. II. c. 24^c; by the *stock jobbing act*, 7 Geo. II. c. 8^d; by the *annuity acts*, 17 Geo. III. c. 26. and 53 Geo. III. c. 141^e; or by the *bankrupt act*, 6 Geo. IV. c. 16^f, &c.

The foregoing pleas, if established, shew that there was no valid or binding contract between the parties: or if there was, the defendant may plead that he has *performed* it, by payment^g, or otherwise^h; or that he is legally *excused* from its performanceⁱ, by the act of God^k, or the king's enemies^l; as, in an action of *debt* or *scire facias* on a recognizance of bail, by the death of the principal before the return of a *capias ad satisfaciendum*^m; or, in an action against a *carrier* for the loss of goods, that the loss happened by lightning or tempest, or capture by an enemyⁿ; or that the defendant is excused by the *agreement* of the parties, as by a defeazance^o, licence^p, release^q, or rescinding the contract before breach^r; or by the act, default, negligence, or misconduct of the plaintiff, as by his non-performance of a condition precedent^s, or refusal to accept the tender of

^a Com. Dig. tit. *Pleader*, 2 G. 8. 2 W. 26. Chit. Stat. 419. Raym. Ent. 96, 7. Morg. Pr. 229. 632. 3 Went. 103. 1 Chit. Jun. Pl. 306. Brogden v. Marriott, 3 Bing. N. R. 88; but see stat. 5 & 6 W. IV. c. 41. as to securities given on a *gaming* consideration.

^b Com. Dig. tit. *Pleader*, 2 G. 7. 2 W. 23. Chit. Stat. 1091, &c. 3 Chit. Pl. 909. (a.) 966. 1 Chit. Jun. Pl. 400; but see stat. 53 Geo. III. c. 93. 3 & 4 W. IV. c. 98. § 7. 5 & 6 W. IV. c. 41. as to securities given on an *unusurious* consideration; Connop v. Yeates, (or Meaks,) 4 Nev. & M. 302. 2 Ad. & E. 326. S. C.

^c Chit. Bills, 8 Ed. 113.

^d Chit. Stat. 1032. 3 Chit. Pl. 968. 1 Chit. Jun. Pl. 396.

^e Chit. Stat. 22, &c. 3 Chit. Pl. 5 Ed. 975, &c. 1 Chit. Jun. Pl. 445; and see Tidd Prac. 9 Ed. 520, &c.

^f § 8. 131; and see Rose v. Main, 1 Scott, 127. 1 Bing. N. R. 357. S. C. Davis v. Holding, 1 Meeson & W. 159. 1 Tyr. & G. 371. S. C.

^g Com. Dig. tit. *Pleader*, 2 G. 10. 2 W. 29. 3 Chit. Pl. 5 Ed. 974, 5, 6. 1001. 1 Chit. Jun. Pl. 204. (4.) 275. (50.) 363, &c. 449, 50.

^h Com. Dig. tit. *Pleader*, 2 G. 15. 2 V. 13. 2 W. 33. 3 Chit. Pl. 5 Ed. 974, 5, 6. 1001. 1 Chit. Pl. Jun. 294. 357. 372. 448. 450.

ⁱ Com. Dig. tit. *Pleader*, 2 V. 13. 16. 2 W. 33. 3 Chit. Pl. 5 Ed. 968, 9.

^k Com. Dig. tit. *Condition*, D. 1, 2. L. 12.

^l Abbott on Shipping, 5 Ed. 251, &c.

^m Tidd Prac. 9 Ed. 1129, and the authorities there cited.

ⁿ Abbott on Shipping, 5 Ed. 251, &c. Post, 330.

^o Com. Dig. tit. *Defeazance*, A. tit. *Pleader*, 2 V. 12. 2 W. 35. 37.

^p 3 Chit. Pl. 5 Ed. 1002. 1 Chit. Jun. Pl. 218.

^q Com. Dig. tit. *Pleader*, 2 G. 13. 3 Chit. Pl. 5 Ed. 969.

^r Taylor v. Hillary, 1 Crompt. M. & R. 741. 5 Tyr. Rep. 373. 1 Gale, 22. 3 Dowl. Rep. 461. 7 Car. & P. 30. S. C. 1 Chit. Jun. Pl. 310. 337. (3.) 375. 384. (13.); but see Edwards v. Chapman, 1 Meeson & W. 231. 1 Tyr. & G. 461. 4 Dowl. Rep. 732. 11 Leg. Obs. 231, 2. 12 Leg. Obs. 180, 81. S. C. Rosc. Law Tracts, 28, &c.

^s 3 Chit. Pl. 5 Ed. 990. 1 Chit. Jun.

a debt ^a, or of sufficient amends; or by his hindering the performance of the contract by the defendant ^b; or preventing him from deriving any benefit therefrom, as by the plaintiff's entry and expulsion ^c, or by his misconduct in performing works or services ^d, or otherwise ^e.

The defendant also, if liable to an action for the non-performance of his contract, may plead that he is not liable to be sued thereon by the plaintiff, on the ground of his having become an *alien enemy* after the contract ^f, or been *attainted* ^g, or *outlawed* ^h, or by reason of his *bankruptcy* ⁱ, or discharge under an *insolvent debtors' act* ^k; or that the defendant is not liable to be sued by the plaintiff *alone*, on account of his having a partner who has not joined in bringing the action; or that he is not liable to be sued at *law*, by reason of the partnership of the plaintiff and defendant ^l, or of one of several parties with the adverse party ^m, in which two latter cases the plaintiff's proper remedy is by bill in equity; or that he is not liable to be sued in a *superior court*, for debts under a certain amount, by reason of the court of requests' acts for the *Tower Hamlets* ⁿ, &c.

In avoidance of liability.

Pl. 325. (7.) 326. (8.) 327. (12.) 383. (12.) 386. (16.) 403. (3.) 406. (1.) 407. (2.) 409. (4.) 411. (6, 7.)

^a Com. Dig. tit. *Pleader*, 2 G. 2. 2 W. 28. 49. 3 Chit. Pl. 5 Ed. 922. 1 Chit. Jun. Pl. 396, &c. 461. And for the doctrine of *tender*, and the cases in which it is or is not allowed, at common law or by statute, at what time, by and to whom, and in what manner it should be made, and when and how it should be pleaded, &c. see Tidd *Sup.* 1830. p. 10, &c.

^b 3 Went. 421. 429, 30.

^c Com. Dig. tit. *Pleader*, 2 W. 50. 1 Chit. Jun. Pl. 339. (5, 6.)

^d 1 Chit. Jun. Pl. 221. (2.) 239. (8.) 241. (9.) 242. (10.) 311. (1.) 340. (7.) 351. (1.) 354. (4.) 381. (9, 10.) 410. (5.)

^e 1 Chit. Jun. Pl. 246. (2.) 352. (2.) 355. (5.) 386; and see *id.* 350. (1.) *Young v. Murphy*, 3 Bing. N. R. 54. 3 Scott, 379. S. C.

^f *Ante*, 324. (c.)

^g Co. Lit. 130. a. Com. Dig. tit. *Abatement*, E. 3. tit. *Pleader*, 2 W. 24. Lutw. 610. 1 Morg. Mod. Pl. 77. 3 Went. 115; and see *Bullock v. Dodds*, 2 Barn. & Ald. 258. *Doe d. Evans v. Evans*, 5 Barn. & C. 584. *Lee v. Macdonald*, 2

Moore & S. 140. *Doe d. Griffith v. Pritchard*, 5 Barn. & Ad. 765. *Symonds v. Blake*, 1 Gale, 182. 2 Crompt. M. & R. 416. S. C.

^h Co. Lit. 128. Com. Dig. tit. *Abatement*, E. tit. *Pleader*, 2 G. 4. 2 V. 10. 2 W. 24. 2 Rich. C. P. 23. Morg. Pr. 224. 3 Went. 153, 4.

ⁱ 3 Chit. Pl. 5 Ed. 918. 1 Chit. Jun. Pl. 250; and see *Kitchen v. Bartsch*, 7 East, 58. *Eckhardt v. Wilson*, 8 Durnf. & E. 140. *Crofton v. Pool*, 1 Barn. & Ad. 568.

^k 3 Chit. Pl. 5 Ed. 921.

^l 1 Chit. Jun. Pl. 362. *Pearson v. Skelton*, 1 Meeson & W. 504. *Post*, 342.

^m 3 Chit. Pl. 5 Ed. 908, 9; and see Tidd *Prac.* 9 Ed. 6. *Holmes v. Higgins*, 1 Barn. & C. 74. *Milburn v. Codd*, 7 Barn. & C. 419. 1 Man. & R. 238. S. C. *Jones v. Yates*, 4 Man. & R. 613. *Hammond v. Teague*, 3 Moore & P. 474. 6 Bing. 197. S. C.; but see *Rose v. Poulton*, 2 Barn. & Ad. 822.

ⁿ 23 Geo. II. c. 30. § 21. For the mode of taking advantage of court of requests' acts, by plea, suggestion, or motion, see Tidd *Prac.* 9 Ed. 960, 61. *Sandall v. Bennett*, 4 Nev. & M. 89. 3 Dowl. Rep. 294. 9 Leg. Obs. 270. S. C.

In discharge.

Pleas in *discharge* of the cause of action are, at common law, by act and agreement of the parties, as by an account stated, and balance due to the plaintiff, for which a negotiable security was given him by the defendant ^a, accord and satisfaction ^b, arbitrament ^c, composition deed or agreement ^d, or release *after* breach ^e; or by act and operation of law, as by a former recovery ^f or acquittal, or foreign attachment ^g: or they are by act of parliament, as where the defendant is discharged by his *bankruptcy* and certificate ^h, or under an *insolvent* debtors' act ⁱ, or in cases of *set off* ^k, or mutual credit ^l, or by the statute of *limitations* ^m.

^a Com. Dig. tit. *Pleader*, 2 G. 11; and see Tidd *Prac.* 9 Ed. 643, 4. 1 Chit. *Pl.* 417, 18. 426, 7. 3 Chit. *Pl.* 926; *Kearslake v. Morgan*, 5 Durnf. & E. 513. *Simon v. Lloyd*, 3 Dowl. Rep. 813. 2 Crompt. M. & R. 187. 5 Tyr. Rep. 701. 10 Leg. Obs. 301. S. C. 1 Chit. *Jun.* Pl. 214. 279. (i.) 281. (4.) 282. (5, 6.).

^b Com. Dig. tit. *Accord*, C. tit. *Pleader*, 2 G. 9. 12. 2 V. 8. 2 W. 46. Bac. Abr. tit. *Accord and Satisfaction*. C. 3 Chit. *Pl.* 5 Ed. 926, 7. 1 Chit. *Jun.* Pl. 206. 309. 405. 444; and see *Worswick v. Beswick*, 10 Barn. & C. 676. 5 Man. & R. 586. S. C. *Thompson v. Percival*, 3 Nev. & M. 167. 5 Barn. & Ad. 925. S. C. *Faith v. McIntyre*, 7 Car. & P. 44; but see *Davis v. Gyde*, 4 Nev. & M. 462. 2 Ad. & E. 623. S. C. *Crisp v. Griffiths*, 3 Dowl. Rep. 752. 2 Crompt. M. & R. 159. 5 Tyr. Rep. 619. 7 Car. & P. 42. (a.) S. C. *Allies (Allice or Alice) v. Probyn*, 2 Crompt. M. & R. 408. 4 Dowl. Rep. 153. 1 Gale, 255. 10 Leg. Obs. 430, 31. S. C. *Thomas v. Shillibeer*, 1 Meeson & W. 124. 1 Tyr. & G. 290. 1 Gale, 371. S. C. *Weston v. Foster*, 2 Bing. N. R. 693. 3 Scott, 155. S. C. *Siboni v. Kirkman*, 1 Meeson & W. 418. 1 Tyr. & G. 777. S. C.

^c Com. Dig. tit. *Accord*, D. tit. *Pleader*, 2 G. 9. 2 V. 9. Bac. Abr. tit. *Arbitrament and Award*, G. 3 Chit. *Pl.* 5 Ed. 927, 8. 1 Chit. *Jun.* Pl. 325; and see *Gascoyne v. Edwards*, 1 Younge & J. 19; but see *Allen v. Milner*, 2 Crompt. & J. 47. 2 Tyr. Rep. 113. 1 Price, N. R. 142. 3 Leg. Obs. 150. S. C.

^d Com. Dig. tit. *Pleader*, 2 G. 6. 3 Chit. *Pl.* 931. 1 Chit. *Jun.* Pl. 286; and see *Lewis v. Jones*, 4 Barn. & C. 506. 6 Dowl. & R. 567. S. C. *Good v. Cheeseman*, 2 Barn. & Ad. 328. *Cartwright v. Cooke*, 3 Barn. & Ad. 701; but see *Took v. Tuck*, 12 Moore, 435. 4 Bing. 224. S. C. *Tuck v. Took*, 9 Barn. & C. 437. 4 Man. & R. 393. S. C. in Error; *Garrard v. Woolner*, 1 Moore & S. 327. 8 Bing. 258. S. C. *Cooper v. Phillips*, 1 Crompt. M. & R. 649. 5 Tyr. Rep. 166. 3 Dowl. Rep. 196. S. C. *Vine v. Mitchell*, 1 Moody & R. 337. *per Tindal*, Ch. J. *Reay v. Richardson*, 1 Gale, 219. 2 Crompt. M. & R. 422. S. C.

^e Com. Dig. tit. *Pleader*, 2 G. 14. 2 V. 11. 2 W. 30. 34. 3 Chit. *Pl.* 5 Ed. 930. 1 Chit. *Jun.* Pl. 374. 459.

^f 3 Chit. *Pl.* 5 Ed. 929, 30. 1 Chit. *Jun.* Pl. 334.

^g Com. Dig. tit. *Attachment*, H. tit. *Pleader*, 2 G. 5. 2 Lutw. 986. 2 Morg. Mod. Pl. 57. 3 Went. 247; and see *Morris v. Ludlam*, 2 H. Blac. 362. *Tamm v. Williams*, 2 Chit. Rep. 438. *Banks v. Self*, 5 Taunt. 234. *Nonell v. Hullett*, 4 Barn. & Ald. 646.

^h 3 Chit. *Pl.* 5 Ed. 911. 913, &c. 1 Chit. *Jun.* Pl. 247.

ⁱ Com. Dig. tit. *Pleader*, 2 G. 16. 3 Chit. *Pl.* 5 Ed. 919, 20. 1 Chit. *Jun.* Pl. 317; and see Tidd *Prac.* 9 Ed. 394. *Gould v. Lasbury*, (or *Rasperry*), 4 Tyr. Rep. 863. 1 Crompt. M. & R. 254. 2 Dowl. Rep. 707. S. C.

^k 3 Chit. *Pl.* 5 Ed. 923. 931, &c. 968, &c. 1 Chit. *Jun.* Pl. 387, &c. 460; and

In actions for *wrongs*, pleas are in *denial*, *justification*, or *excuse*, of the injury complained of, or in *discharge* of the cause of action. The common pleas in denial are, in *detinue*, *non detinet*^a; in *case*, not guilty of the *premises*^o; in *replevin*, *non cepit*^p; and in *trespass vi et armis*, not guilty of the *trespasses*^o. But besides these common pleas, there are others which may be pleaded in actions for wrongs, denying some particular matter alleged in the declaration; as, in *detinue*, the plaintiff's property in the goods^q; in *case*, the facts stated in the inducement to the breach of duty, or wrongful act alleged to have been committed by the defendant^r; in *trespass quare clausum fregit*, the plaintiff's possession, or right of possession, of the *locus in quo*^s; and in *trespass de bonis asportatis*, his property in the goods mentioned in the declaration^t.

Pleas of *justification*, in actions for *wrongs*, are founded on some matter of fact, shewing that the supposed breach of duty or wrongful act was lawful: Pleas in *excuse* are calculated to shew that the damages sustained by the plaintiff were occasioned by his own act or default, or by the act of God, the law, or the king's enemies, without any fault or misconduct of the defendant. Thus, the defendant, in *detinue*, may plead in *justification*, that the goods were pawned to him for money, which remains unpaid^u; or that he has a lien thereon^x; or, upon a *bailment*, that they were delivered to the person for whom they were bailed^y: or he may plead in *excuse*, that the goods were delivered to him to take care of as his own proper goods, and that they were afterwards feloniously stolen by some person unknown, without his wilful default or privity^z. In

see 1 Chit. Pl. 5 Ed. 484. Tidd Prac. 9 Ed. 662.

¹ 1 Chit. Jun. Pl. 391.

^a 3 Chit. Pl. 5 Ed. 940, 41. 1 Chit. Jun. Pl. 345. 487; and see Tidd Prac. 9 Ed. 14, &c. Ante, 4, &c.

^o 3 Chit. Pl. 1023. Steph. Pl. 3 Ed. 157. 159. But a plea in *detinue*, on a bailment, that the plaintiff did not deliver the goods to the defendant, is bad on general demurrer. Walker v. Jones, 4 Tyr. Rep. 915. 2 Crompt. & M. 672. S. C.; and see Gledstane v. Hewitt, 1 Tyr. Rep. 445. 1 Crompt. & J. 565. 1 Price, N. R. 71. S. C. and the authorities there referred to.

^o Append. to Tidd Prac. 9 Ed. Chap. XXVII. § 6.

^p Id. Ch. XLV. § 64.

^q R. Pl. H. 4 W. IV. *Detinue*, reg.

III. 5 Barn. & Ad. Append. ix. 10 Bing. 470. 2 Crompt. & M. 22.

^r Id. *Case*, reg. IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 470, 71. 2 Crompt. & M. 22.

^s Id. *Trespass*, reg. V. § 2. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

^t Id. § 3. 5 Barn. & Ad. Append. x. 10 Bing. 471. 2 Crompt. & M. 24.

^u Co. Lit. 283.

^x Alexander v. Mc'Gowan, Sit. after M. T. 3 Geo. IV. per Abbott, Ch. J.

^y Com. Dig. tit. *Pleader*, 2 X. 6; and see 1 Chit. Pl. 114. 480. Tidd Prac. 9 Ed. 652.

^z Kettle v. Bromsall, Willes, 119; and see 1 Chit. Jun. Pl. 218. (5.)

In trover. *trover*, as in *detinue*, the defendant may plead in *justification*, that he has a special property in the goods, or a lien thereon^a, or a sale in market overt^b, &c. In an action of *slander*, the defendant may justify the speaking of the words, or publication of the libel complained of, as being true^c; and in an action on the case against a *carrier* for the loss of goods, the defendant may plead in *excuse*, that the loss was occasioned by the act of God, or the king's enemies^d; or, in an action for *negligence* in driving a carriage^e, or navigating a vessel^f, &c. that the accident happened by the negligence or default of the plaintiff, or his servants.

In replevin. In *replevin*, the defendant may plead property in himself, or a third person^g: and when he goes for a return of the cattle or goods, he may *avow* the taking of them^h, if the distress was made in his own right or in right of his wife, or make *cognizance*ⁱ, if it was made by him as *bailiff* to another; but if he do not go for a return, he may merely *justify* the taking^k. Avowries and cognizances are founded on distresses at common law, for *rents*^l, *services*^m, or *customs*ⁿ, or for *damage feasant*^o; and are either by the party in *possession*, claiming

^a *Alexander v. MacGowan*, Sit. after M. T. 3 Geo. IV. per *Abbott*, Ch. J. *Hewison v. Guthrie*, 2 Bing. N. R. 755. 3 Scott, 298. S. C.; and see 1 Chit. Jun. Pl. 436. *Tidd Prac.* 9 Ed. 651.

^b For the effect of a sale in market overt of cattle or goods which had been feloniously stolen, after conviction of the offender, see *Horwood v. Smith*, 2 Durnf. & E. 755. *Peer v. Humphrey*, 4 Nev. & M. 430. 2 Ad. & E. 495. S. C.

^c *Smith v. Richardson*, Willes, 20. 24. Com. Rep. 551. *Barnes*, 195. Pr. Reg. 383. S. C. *Underwood v. Parks*, 2 Str. 1200.

^d *Abbott on Shipping*, 5 Ed. 251, &c. *Dale v. Hall*, 1 Wils. 281. *Forward v. Pittard*, 1 Durnf. & E. 27. *Hyde v. Trent and Mersey Navigation Company*, 5 Durnf. & E. 389. 1 Esp. 36. S. C. *Johnston v. Benson*, 4 Moore, 90. 1 Brod. & B. 454. S. C.

^e *Leame v. Bray*, 5 Esp. Rep. 18. 3 East, 593. S. C. *Clay v. Wood*, 5 Esp. Rep. 44. per *Ld. Ellenborough*, Ch. J. *Wordsworth v. Willan*, *id.* 273. per *Rooke*, J.; and see *Boss v. Litton*, 5 Car. & P. 407. *Goodman v. Taylor*, *id.* 410. per

Denman, Ch. J. *Pearcy v. Walter*, 6 Car. & P. 232. per *Gaselee*, J.

^f *Vanderplank v. Miller*, 1 Moody & M. 169. per *Ld. Tenterden*, Ch. J. *Vennall v. Garner*, 1 Crompt. & M. 21. *Lack v. Seward*, 4 Car. & P. 106. per *Ld. Tenterden*, Ch. J. *Luxford v. Large*, 5 Car. & P. 421. per *Ld. Denman*, Ch. J. *Cross Keys Bridge Company v. Rawlings*, 3 Scott, 400; but see *Trower v. Chadwick*, 3 Bing. N. R. 334.

^g Com. Dig. tit. *Pleader*, 3 K. 12. *Gilb. Repl.* 150. 3 Chit. Pl. 1044.

^h Com. Dig. tit. *Pleader*, 3 K. 13.

ⁱ *Id.* 3 K. 14.

^k *Gilb. Repl.* 150; and see *Hawkins v. Eckles*, 2 Bos. & P. 359.

^l *Append. to Tidd Prac.* 9 Ed. Chap. XLV. § 68; and see Com. Dig. tit. *Pleader*, 3 K. 15. 18, 19. *Gilb. Dist.* 4, 5, 6. *Gilb. Repl.* 156. 158. 3 Chit. Pl. 1047, &c.

^m Com. Dig. tit. *Pleader*, 3 K. 15. 17. 28. *Gilb. Dist.* 4. 6, &c.

ⁿ Com. Dig. tit. *Pleader*, 3 K. 28. *Gilb. Dist.* 18, &c.

^o Com. Dig. tit. *Pleader*, 3 K. 21. *Gilb. Dist.* 21. *Gilb. Repl.* 166.

as freeholder^a, or copyholder^b, or under a demise^c, or by *commoners*^d, or for *fines* or *amerciaments*^e, or on *bye-laws*^f, or *judgments* of the county court^g, or court baron^h; or they arise out of distresses by act of parliament, as by authority of the commissioners of *sewers*, on the statute 23 Hen. VIII. c. 5ⁱ; for *poors'* rates, on the statute 43 Eliz. c. 2^k; for double rent^l, on the statute 11 Geo. II. c. 19. § 18; or, after a fraudulent removal of goods^m, on the same statute, &c. Pleas in bar to avowries and cognizances for rent, &c. either deny the tenancyⁿ, or that there was any rent in arrearⁿ, &c.; or if the distress was for *damage feasant*, they are in denial of the title^o, or demise^o, or under a demise from the defendant^p, or right of common^q, or on the ground of defect of fences^r, tender of amends^s, or the statute of limitations^t.

In *trespass* to the *person*, the defendant may plead in justification, *son assault demesne*^u, either *generally*, in defence of himself^x or of third persons^y, or *specially*, with an *irā motus*^z; *molliter manus imposit*^z, in defence of the possession of real[†] or personal[‡] property, or to preserve the peace, and prevent damage^{||}; or *moderate correction*[¶],

In trespass to the person.

^a Append. to Tidd *Prac.* 9 Ed. Chap. XLV. § 66; and see Com. Dig. tit. *Pleader*, 3 K. 21. 3 Chit. *Pl.* 1058.

^b Com. Dig. tit. *Pleader*, 3 K. 24. Gilb. *Dist.* 5. 3 Chit. *Pl.* 1059.

^c Com. Dig. tit. *Pleader*, 4 K. 21. 3 Chit. *Pl.* 1059.

^d Com. Dig. tit. *Pleader*, 3 K. 24. Gilb. *Dist.* 21. 3 Chit. *Pl.* 1059.

^e Com. Dig. tit. *Pleader*, 3 K. 27. Gilb. *Dist.* 11, &c. 20.

^f Com. Dig. tit. *Pleader*, 3 K. 28. Gilb. *Dist.* 20.

^g Com. Dig. tit. *County*, C. 13. Gilb. *Dist.* 17, 18.

^h Com. Dig. tit. *Copyhold*, R. 18. Gilb. *Dist.* 17, 18.

ⁱ Com. Dig. tit. *Pleader*, 3 K. 26. tit. *Sewers*, E. 6; and see Birkett v. Crozier, 3 Car. & P. 63. 1 Moody & M. 119. S.C.

^k Com. Dig. tit. *Pleader*, 3 K. 26. 2 Lutw. 1179. 3 Chit. *Pl.* 1057.

^l 3 Chit. *Pl.* 1054. a.; and see Timmins v. Rowlinson, 3 Bur. 1603.

^m 3 Chit. *Pl.* 1053.

ⁿ Append. to Tidd *Prac.* 9 Ed. Chap. XLV. § 69; and see Com. Dig. tit. *Pleader*, 3 K. 16. 20. Gilb. *Repl.* 183, &c. 3 Chit. *Pl.* 1189, &c.

^o Append. to Tidd *Prac.* 9 Ed. Chap. XLV. § 67. 3 Chit. *Pl.* 1195.

^p 3 Chit. *Pl.* 1196.

^q Com. Dig. tit. *Pleader*, 3 K. 24. Gilb. *Repl.* 186. 3 Chit. *Pl.* 1199.

^r Gilb. *Repl.* 186. 3 Chit. *Pl.* 1196, 7, 8; and see Dovaston v. Payne, 2 H. Blac. 527.

^s Com. Dig. tit. *Pleader*, 3 K. 23. 3 Chit. *Pl.* 1200.

^t 32 Hen. VIII. c. 2. § 4. Gilb. *Replev.* 188. and see stat. 3 & 4 W. IV. c. 27. § 42; and for the pleadings in *replevin* in general, see 1 Chit. *Pl.* 4 Ed. 436. 510. Tidd *Prac.* 9 Ed. 645.

^u Com. Dig. tit. *Pleader*, 3 M. 15.

^x *Id.* 3 Chit. *Pl.* 1068, 9.

^y Com. Dig. tit. *Pleader*, 3 M. 15. 3 Chit. *Pl.* 1070.

^z 3 Chit. *Pl.* 1069, 70.

[†] Com. Dig. tit. *Pleader*, 3 M. 16.

[‡] *Id.* 3 M. 17. 3 Chit. *Pl.* 1073, &c.

^{||} Com. Dig. tit. *Pleader*, 3 M. 17.

[¶] Com. Dig. tit. *Pleader*. 3 M. 16. 3 Chit. *Pl.* 1071.

[¶] Com. Dig. tit. *Pleader*, 3 M. 19. 3 Chit. *Pl.* 1072; and see 1 Chit. *Pl.* 435. 438. Tidd *Prac.* 9 Ed. 645. 652.

&c.: or he may plead in *excuse*, that the assault was committed through inevitable necessity, against his will; as that at a muster, the defendant, being a soldier, discharged his musket, and the plaintiff suddenly crossed him, whereby he was inevitably struck, against the will of the defendant ^a. In *trespass* and *assault*, the defendant may plead *amicable contest* ^b, or that he wrestled with the plaintiff for a wager ^b: and it seems, that if a person were, by way of joke, or in friendship, to clap another on the back, it might be pleaded as an excuse, or might even perhaps be given in evidence under the plea of not guilty ^c.

To real property.

In *trespass* to real property, pleas of *justification* are in general founded upon *title*, as that the *locus in quo* is the *freehold* ^d (*liberum tenementum*,) or *customary tenement* ^e of the defendant, or of a third person under whom he acted; or that he has a *possessory* right thereto, under a demise ^f, &c. giving colour ^g; or is *tenant in common* with the plaintiff ^h: or the defendant may justify under rights of *common* of pasture ⁱ, estovers ⁱ, or turbary ⁱ, &c. or of several or free *fishery* ^k, free *warren* ^l, &c.; or under rights of *way*, which are public ^m or private ⁿ, and may be claimed, if private, by grant ^o or prescription ^p, or of necessity ^q; or under rights of *entry*, which are of various kinds, and may be classed as follows: first, to enter places of *public* resort, as fairs and markets ^r, inns, taverns ^s, &c.; secondly, to enter private houses, to execute process ^t, or make a distress ^t, or for the purpose of speaking with the plaintiff ^u or his lodgers, or of demanding a debt ^x, or to remove goods belonging to the defendant ^y; thirdly, by the lord of a manor, to take wreck ^z; fourthly, by a rector or

^a 2 Roll. Abr. 548. l. 10. *Weaver v. Ward*, Moore, 864. Com. Dig. tit. *Pleading*, 3 M. 20; and see *id.* 3 M. 30.

^b Com. Dig. tit. *Pleading*, 3 M. 18.

^c *Williams v. Jones*, Cas. temp. Hardw. 301. per Ld. Hardwicke, Ch. J.

^d Com. Dig. tit. *Pleading*, 3 M. 34. 3 Chit. Pl. 1098.

^e 3 Chit. Pl. 1100.

^f Com. Dig. tit. *Pleading*, 3 M. 40.

^g *Id.* *ib.*

^h Com. Dig. tit. *Abatement*, F. 6; and see *Haywood v. Davies*, 1 Salk. 4. Cubitt v. Porter, 2 Man. & R. 267. 1 Mod. Ent. 21.

ⁱ Com. Dig. tit. *Common*, H. tit. *Pleading*, 3 K. 24. 3 Chit. Pl. 1109, &c.

^k Com. Dig. tit. *Piscary*, A. tit. *Pleading*, 3 M. 42. 3 Chit. Pl. 1107, &c.

^l Com. Dig. tit. *Chase*, D.

^m Com. Dig. tit. *Chimin*, A. 3 Chit. Pl. 1117, &c.

ⁿ Com. Dig. tit. *Chimin*, D. 1.

^o *Id.* D. 3. 3 Chit. Pl. 1122, &c.

^p Com. Dig. tit. *Chimin*, D. 2. 3 Chit. Pl. 1119, &c.

^q Com. Dig. tit. *Chimin*, D. 4. 3 Chit. Pl. 1125.

^r *Mayor &c. of Northampton v. Ward*, 1 Wils. 107.

^s Com. Dig. tit. *Pleading*, 3 M. 35. Lil. Ent. 439. 2 Morg. Mod. Pl. 202.

^t Com. Dig. tit. *Pleading*, 3 M. 24. 42. *Id.* 3 M. 35.

^u *Id.* 3 M. 35. 39. 9 Went. 99.

^y Com. Dig. tit. *Pleading*, 3 M. 39. 42. 3 Chit. Pl. 1130. a.

^z Com. Dig. tit. *Pleading*, 3 M. 40.

vicar, to fetch away tithes ^a; fifthly, by an occupier of adjoining land, to repair fences: sixthly, as between landlord and tenant, to view waste ^b, cut down timber ^c, or follow and distrain goods fraudulently removed ^d, or to take estovers ^e, emblements ^f, fixtures, or way going crops ^g; or, seventhly, to abate nuisances ^h, or remove obstructions ⁱ. So, in trespass *quare clausum fregit*, for damage done by cattle, the defendant may plead in *excuse*, that the plaintiff, by prescription, ought to repair the fences between his close and that of the defendant, and for want of repairs, the cattle escaped, and did the damage alleged ^k; or that the plaintiff ought to repair the fences between his close and a highway, and for want thereof the defendant's cattle escaped out of the highway ^l; or that he ought to repair the fences between his close and the place where the defendant has a right of common ^m.

In trespass to *personal* property, in taking cattle or goods, the defendant may plead that they were his own *property* ⁿ, giving colour, or *tenancy in common* with the plaintiff ^o; or that they were taken under a distress for *rent* ^p, &c. at common law, or by act of parliament; or for *damage feasant* ^q, or as estrays ^r; or, in trespass for killing dogs ^s, he may justify as park-keeper, &c.; or for cutting ropes ^t, that it was necessary to prevent damage ^u; or he may plead in *excuse*, that he took the goods to avoid damage otherwise inevitable; as in trespass to personal property, that he threw the goods, being in a common barge upon the Thames, into the water in a tempest, to save the passengers' lives ^x; or that he took them out of a house, to preserve them from fire ^y. So, he may plead that he chased sheep, mixed with his own,

To personal property.

^a Com. Dig. tit. *Pleader*, 3 M. 40.
3 Chit. Pl. 1128.

^b Com. Dig. tit. *Pleader*, 3 M. 35.

^c 9 Went. 150.

^d 3 Chit. Pl. 1137. *Rand v. Vaughan*,
1 Scott, 670. 1 Hodges, 173. S. C.

^e 2 Morg. Mod. Pl. 215.

^f 3 Wils. 67. 129.

^g *Beavan v. Delahay*, 1 H. Blac. 5.

^h Com. Dig. tit. *Pleader*, 3 M. 37. 3
Chit. Pl. 1102. 1130.

ⁱ Com. Dig. tit. *Chimin*, D. 8. tit.
Pleader, 3 M. 38. 40.

^k Com. Dig. tit. *Pleader*, 3 M. 29.
Tho. Ent. 304.

^l Com. Dig. tit. *Pleader*, 3 M. 29;
but see *Dovaston v. Payne*, 2 H. Blac.
527.

^m Com. Dig. tit. *Pleader*, 3 M. 29.

Winch, 996 or 1110. Ed. 1680. Lutw.
1357.

ⁿ Com. Dig. tit. *Pleader*. 3 K. 12.

^o Com. Dig. tit. *Abatement*, F. 6. Anon.

^p Skin. 12. 1 Mod. Ent. 21.

^q Com. Dig. tit. *Pleader*, 3 M. 25. 3
Chit. Pl. 1094. a. b.

^r Com. Dig. tit. *Pleader*, 3 M. 26. 3
Chit. Pl. 1093, 4.

^s 2 Morg. Mod. Pl. 203.

^t Com. Dig. tit. *Pleader*, 3 M. 33. 3
Chit. Pl. 1097.

^u Com. Dig. tit. *Pleader*, 3 M. 27.

^x Tidd Prac. 9 Ed. 645. 652; and see
1 Chit. Pl. 439.

^y Mouse's case, 12 Co. 63. 2 Rol. Abr.
567. l. 5.

^z Com. Dig. tit. *Pleader*, 3 M. 27.

to a place where he might separate them ^a; or that his dog chased the plaintiff's sheep out of defendant's land, and pursued them against his will into the plaintiff's land ^b. The defendant may also justify, in this and other actions of *trespass*, under a *licence* ^c from the plaintiff, or *legal process* ^d, criminal ^e or civil ^f; which latter may issue out of superior or inferior courts ^g, and is original, mesne ^h, or final ⁱ; or he may justify by authority of *law*, without process, as an *individual*, on suspicion of felony ^k, &c. or as an *officer* ^l, or in his aid.

Pleas in discharge.

The pleas which have been hitherto mentioned, in actions for *wrongs*, go to prove that the plaintiff never had any cause of action; or, admitting that he had, the defendant may plead that it was *discharged* by some subsequent or collateral matter; as by an accord and satisfaction ^m, arbitrament ⁿ, release ^o, former recovery ^p, or distress for the same cause, tender of sufficient amends for an involuntary trespass ^q, or the statute of limitations ^r.

Power of judges to make alterations, as to mode of pleading, &c. in superior courts.

By the late act for the further amendment of the law ^s, &c. reciting that it would greatly contribute to the diminishing of expense in suits in the superior courts of common law at *Westminster*, if the pleadings therein were in some respects altered, and the questions to be tried by the jury left less at large than they then were, according to

^a Com. Dig. tit. *Pleader*, 3 M. 31. 9 Went. 304.

^b *Id.* Lutw. 13. 119.

^c Com. Dig. tit. *Pleader*, 3 M. 35. 3 Chit. *Pl.* 1106; and see Hob. 174, b. Bennett v. Allcott, 2 Durnf. & E. 166. Taylor v. Smith, 7 Taunt. 156. Peters v. Stanway, 6 Car. & P. 737. *per Alderson*, B.; but see 21 Hen. VII. 28. pl. 5. *per Rede*, *contra*.

^d Com. Dig. tit. *Pleader*, 3 M. 24. 42.

^e Com. Dig. tit. *Pleader*, 3 M. 23. 3 Chit. *Pl.* 1091. a.

^f Com. Dig. tit. *Pleader*, 3 M. 24. 42.

^g 3 Chit. *Pl.* 1091.

^h *Id.* 1083, &c. 1130.

ⁱ *Id.* 1088, &c. 1132.

^k Com. Dig. tit. *Pleader*, 3 M. 22. 3 Chit. *Pl.* 1081.

^l Com. Dig. tit. *Pleader*, 3 M. 22. 3

Chit. *Pl.* 1076, &c.; and see 1 Chit. *Pl.* 440. Tidd *Prac.* 9 Ed. 645, 6.

^m Com. Dig. tit. *Pleader*, 3 M. 12. 3 Chit. *Pl.* 1062.

ⁿ Com. Dig. tit. *Pleader*, 3 M. 13. 3 Chit. *Pl.* 930. 1062.

^o Com. Dig. tit. *Pleader*, 3 M. 14. 1 Mod. Ent. 196; and for a form of a plea of judgment recovered by defendant against the plaintiff, for the same trespasses, see 3 Chit. *Pl.* 5 Ed. 1062.

^p Com. Dig. tit. *Pleader*, 3 M. 36. 3 Chit. *Pl.* 1066; and see stat. 21. Jac. 1. c. 16. § 5.

^q Com. Dig. tit. *Pleader*, 3 M. 11. 3 Chit. *Pl.* 1067; and see further, as to pleas in discharge, Tidd *Prac.* 9 Ed. 646. 1 Chit. *Pl.* 441.

^r 3 & 4 W. IV. c. 42. § 1; and see 2 Rep. C. L. Com. 44, &c. 89, &c.

the course and practice of pleading in several forms of action ; but this could not be conveniently done, otherwise than by rules and orders of the judges of the said courts, from time to time to be made ; and doubts might arise, as to the power of the said judges to make such alterations, without the authority of parliament ; it was enacted, that “ the judges of the said superior courts, or any *eight* or more of “ them, of whom the chief of each of the said courts should be *three*, “ should and might, by any rule or order to be from time to time by “ them made, in term or vacation, at any time within *five* years from the “ time when that act should take effect; make such alterations in the “ mode of pleading in the said courts, and in the mode of entering “ and transcribing pleadings, judgments, and other proceedings, in “ actions at law, and such regulations, as to the payment of costs “ and otherwise, for carrying into effect the said alterations, as to them “ might seem expedient ; and all such rules, orders or regulations, “ should be laid before both houses of parliament, if parliament were “ then sitting, immediately upon the making of the same ; or if parliament were not sitting, then within *five* days after the next meeting “ thereof ; and no such rule, order, or regulation, should have effect, “ until *six* weeks after the same should have been so laid before both “ houses of parliament ; and any rule or order so made should, from “ and after such time aforesaid, be binding and obligatory on the said “ courts, and all other courts of common law, and on all courts of “ error, into which the judgments of the said courts, or any of them, “ should be carried by any writ of error, and be of the like force and “ effect, as if the provisions contained therein, had been expressly “ enacted by parliament.” And, by the late act for improving the practice and proceedings in the court of Common Pleas of the county palatine of *Lancaster* ^a, the judges of the said court for the time being, or any *two* of them, were authorized from time to time, to make such orders, rules, and regulations, for altering and regulating the mode of pleading in that court, and for altering the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law therein, as to the said judges, or any *two* of them, should seem meet ; and it was thereby declared, that the costs to be from time to time allowed for preparing pleadings in actions in the said court of Common Pleas at *Lancaster*, should be the same as should be allowed for preparing pleadings of a like description, in actions in the superior courts at *Westminster* ^b.

In C. P. at
Lancaster.

^a 4 & 5 W. IV. c. 62. § 17.

^b § 35.

Rules made by judges of superior courts, in pursuance of law amendment act.

General, or in particular actions.

General rules, relating to all pleadings, &c. what.

In pursuance of the power given by the law amendment act, general rules, we have seen ^a, were made by all the judges of the superior courts of common law at *Westminster*, in *Hilary* term 1834; which, after being laid the requisite time before both houses of parliament, and received their sanction, came into operation on the first day of *Easter* term following. These rules, which are considered as statutory, and part of the law of the land ^b, are of two kinds: first, general rules and regulations, relating to all pleadings, &c.; and secondly, rules relating to the mode of pleading in the particular actions of *assumpsit*, *covenant*, *debt*, *detinue*, *case*, and *trespass*. The former of these rules prescribe the form of declaring in a second action, after a plea in abatement of the non-joinder of another person ^c; of a plea of payment of money into court ^d, and the replication thereto ^e; of a plea *puis darrein continuance*, or after the last pleading, or issuing of the jury process ^f; and of a demurrer, and joinder in demurrer ^g. Material alterations are also made thereby, in the mode of entitling and entering declarations ^h, and other pleadings ^h; the beginning and conclusion of pleas ⁱ; the entry of proceedings on the record for trial ^k, or on the judgment roll ^k, and of all judgments, whether interlocutory or final ^l, and the fees chargeable in respect of issues ^m. The statement of the *venue* in the body of the declaration ⁿ, or any subsequent pleading ⁿ, the formal defence in a plea ^o, the rule or order to pay money into court, except under the 3 & 4 W. IV. c. 42 § 18 ^p, the use of a protestation in any pleading ^q, the entry of continuances, with certain exceptions ^r, and of warrants of attorney to sue or defend ^s, are abolished by these rules: and the use of several counts ^t, pleas ^u, avowries, or cognizances ^u, are prohibited thereby, unless a distinct subject matter of complaint, or ground of answer or defence, is intended to be established at the trial, in respect of each count, or plea, &c.

^a *Ante*, 30.

^b *Roffey v. Smith*, 6 Car. & P. 662.

^c R. Pl. Gen. H. 4 W. IV. reg. 20.

^d Barn. & Ad. Append. vii. 10 Bing. 469.

^e *Crompt. & M.* 19. *Ante*, 210, 11.

^f *Id.* reg. 17. *Ante*, Chap. XXV.

^g *Id.* reg. 19. *Ante*, Chap. XXV. *Post*, Chap. XXVIII.

^h *Id.* reg. 2. *Post*, Chap. XXXVII.

ⁱ *Id.* reg. 14. *Post*, Chap. XXIX.

^k *Id.* reg. 1. *Ante*, 207, 8. *Post*, Chap. XXX.

^l *Id.* reg. 9. 11. 13.

^m *Id.* reg. 15. *Post*, Chap. XXXIV.

ⁿ *Id.* reg. 3. *Ante*, 296. *Post*, Chap. XXXIX.

^o *Id.* reg. 16. *Post*, Chap. XXX.

^p *Id.* reg. 8. *Ante*, 209.

^q *Id.* reg. 10.

^r *Id.* reg. 18. *Ante*, Chap. XXV.

^s *Id.* reg. 12. *Post*, Chap. XXVIII.

^t *Id.* reg. 2. *Ante*, 227, 8. *Post*, Chap. XXX.

^u *Id.* reg. 4. *Post*, Chap. XXX.

^v *Id.* reg. 5, 6, 7. *Ante*, 216, &c.

^w *Id.* *ib.*

The principal object of the latter rules, or those which relate to pleadings in particular actions, seems to have been, to limit the operation of the general issues formerly used, and confine the pleas in denial substituted in lieu thereof, in actions upon *contracts*, to a direct denial of the contract^a; and in actions for *wrongs*, to a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant^b; making him plead specially in denial of any other material fact stated in the declaration, and all matters in confession and avoidance, or discharge of the cause of action^c. These latter rules, however, do not contain any particular directions as to the mode of pleading in the actions of *account*, *annuity*, *debt* or *scire facias* on matters of record, as judgments or recognizances, or *debt* on penal statutes; nor in the action of *replevin*, or *trespass* to the *person*: though these actions are subject to the general rules and regulations applicable to all pleadings, &c. And there is a *proviso* in the act^d, that "no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was, or thereafter should be entitled so to do, by virtue of any act of parliament then or thereafter to be in force."

Object of rules, relating to pleadings in particular actions.

To what actions they do not apply.

When general issue is given by act of parliament.

It will next be proper to consider what must now, since the late statutory rules of pleading, be proved by the *plaintiff*, and afterwards what might have been formerly, and may now be given in evidence by the *defendant*, on the general issue or common plea in denial, or must be pleaded specially, in actions upon *contracts*, and for *wrongs*.

What must be proved by plaintiff, on general issue.

In actions upon *contracts*, the plaintiff, by the above statutory rules, must prove, on the plea of *non assumpsit*, in all actions of *assumpsit*, except on bills of exchange and promissory notes, the *express* contract or promise alleged in the declaration, or the matters of fact from which the contract or promise alleged may be *implied* by law^e; as, in an action on a warranty, the fact of the warranty having been given upon the alleged consideration^f; in an action on a *policy* of insurance, the subscription to the alleged policy by the defendant^g; in actions against *carriers* and other bailees, for not delivering or not keeping goods safely, or not returning them on request^h, and in actions against

In actions upon contracts.

^a *Passenger v. Brookes*, 1 Bing. N. R. 587. 1 Scott, 560. 1 Hodges, 123. 7 Car. & P. 110. S. C.

^b *Pearcy v. Walter*, 6 Car. & P. 232.

^c 3 Rep. C. L. Com. 54, 5. 59, 60.

^d 3 & 4 W. IV. c. 42. § 1.

^e R. Pl. H. 4 W. IV. *Assumpsit*, reg. I. § 1. 5 Barn. & Ad. Append. vii. 10 Bing. 469. 2 Crompt. & M. 20.

agents for not accounting, an express contract to the effect alleged in the declaration, and such bailment or employment as would raise a promise in law to the effect alleged; in an action of *indebitatus assumpsit* for goods sold and delivered, the sale and delivery of the goods in point of fact; and in the like action for money had and received, both the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff^a. In *debt* on specialty, or *covenant*, the plaintiff must prove, on the plea of *non est factum*, the execution of the deed, in point of fact^b; and in actions of *debt* on simple contract, other than on bills of exchange and promissory notes, the plea of *nunquam indebitatus* has the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*^c.

For wrongs.

In actions for *wrongs*, independently of contract, the plaintiff must prove, on the plea of *non detinet* in an action of *detinue*, the detention of the goods by the defendant^d; and, on the plea of not guilty in actions on the *case*, the breach of duty, or wrongful act, alleged to have been committed by the defendant^d; as, in an action on the *case* for a *nuisance* to the occupation of a house, by carrying on an offensive trade, that the defendant carried on the alleged trade in such a way as to be a nuisance thereto^d; in an action on the *case* for obstructing a right of way, the obstruction complained of; in an action of *trover*, the conversion of the plaintiff's goods^d; and in an action of *slander*, the speaking of the words, or publication of the libel complained of, and that they were spoken or published maliciously, and in the sense imputed^e; and, if spoken and published of the plaintiff in his office, profession, or trade, that they were so spoken or published with reference thereto^f. The plaintiff must also prove, in an action for an *escape*, the neglect or default of the sheriff, or his officers^f; and in an action against a *carrier*, the loss or damage for which the action is brought^f: In actions of *trespass quare clausum fregit*, he must prove, on the plea of not guilty, that the defendant committed the trespass alleged, in the *locus in quo*^g; and in actions of *trespass*

^a R. Pl. H. 4 W. IV. *Assumpsit*, reg. I. § 1. 5 Barn. & Ad. Append. vii. 10 Bing. 469. 2 Crompt. & M. 20.

^b *Id.* *Covenant and Debt*, reg. II. § 1. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 21.

^c *Id.* § 3. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 22.

^d R. Pl. H. 4 W. IV. *Detinue*, reg.

III. 5 Barn. & Ad. Append. ix. 10 Bing. 470. 2 Crompt. & M. 22.

^e *Empson v. Fairfax*, 13 Leg. Obs. 222.

^f R. Pl. H. 4 W. IV. *Case*, reg. IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 470. 2 Crompt. & M. 22.

^g R. Pl. H. 4 W. IV. *Trespass*, reg. V. § 2. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

de bonis asportatis, that he committed the trespass alleged, by taking or damaging the goods mentioned in the declaration ^a.

In *assumpsit*, we have seen ^b, the general issue, or common plea in denial, is *non assumpsit*: and this plea was formerly holden to be proper, when there was either no contract between the parties, or not such a contract as the plaintiff had declared on; and the defendant might have given in evidence under it, that the contract was *void* in law, by coverture ^c, gaming ^d, usury ^e, &c. or *voidable* by infancy ^f, duress, &c.; or, if good in point of law, that it had been *performed* ^g, or that there was some legal *excuse* for its non-performance, as a release ^h, or discharge before breach ^h, or non-performance by the plaintiff of a condition precedent ^h, &c. This sort of evidence was calculated to shew that the plaintiff never had a cause of action: but if he had, the defendant might have given in evidence under the general issue, that it was *discharged* by an accord and satisfaction ⁱ, arbitrament, release ^k, foreign attachment ^l, or former recovery for the same cause ^m, &c.: In short, the question in *assumpsit*, upon the general issue, was whether there was a subsisting debt or cause of action, at the time of commencing the suit ⁿ. But matter of defence arising *after* action brought, could not have been pleaded in bar of the action generally; and therefore was not admissible in evidence under

What might have been formerly, and may now be given in evidence by defendant, on general issue, or must be pleaded specially, in *assumpsit*.

^a *Id.* § 3. 5 Barn. & Ad. Append. x. 10 Bing. 471. 2 Crompt. & M. 24.

^b *Ante*, 323.

^c James v. Fowkes, 12 Mod. 101.

^d Hussey v. Jacob, 1 Ld. Raym. 87.

1 Salk. 344. Carth. 356. 5 Mod. 170.

12 Mod. 97. Com. Rep. 4. S. C.

^e Ld. Bernard v. Saul, 1 Str. 498.

^f Darby v. Boucher, 1 Salk. 279. Madox v. Eden, 1 Bos. & P. 481. (a.)

^g Brown v. Cornish, 1 Ld. Raym. 217.

Paramore (or Paramour) v. Johnson, *id.* 566. 12 Mod. 376. S. C. Sea v. Taylor, 1 Salk. 394.

^h *Ante*, 326.

ⁱ Paramore (or Paramour) v. Johnson, 1 Ld. Raym. 566. 12 Mod. 376. S. C. Martin v. Thornton, 4 Esp. Rep. 181. *per* Ld. Alvanley, Ch. J.; but see *Ad-derley v. Evans*, 1 Ken. 250. *Roades v.*

Barnes, *id.* 391. 1 Bur. 9. 1 Blac. Rep. 65. S. C.; and see *Rolt v. Watson*, 12 Moore, 82. 4 Bing. 273. S. C. Siboni v. Kirkman, 1 Meeson & W. 418. 1 Tyr. & G. 777. S. C.

^k Gilb. C. P. 64. Sullivan v. Montague, Doug. 106, 7. Miller v. Aris, 3 Esp. Rep. 234. *per* Ld. Kenyon, Ch. J.

^l Brook v. Smith, 1 Salk. 280. *Ante*, 328.

^m Burrows v. Jemino, 2 Str. 733. Stafford v. Clark, 9 Moore, 724. 2 Bing. 377. 1 Car. & P. 403. S. C. 2 Man. & R. 589. (b.) *Ante*, 326.

ⁿ Sullivan v. Montague, Doug. 106, 7. Gilb. C. P. 64, 5; and see *Worswick v. Beswick*, 10 Barn. & C. 676. 5 Man. & R. 586. S. C. Crump v. Adney, 1 Crompt. & M. 355. 3 Tyr. Rep. 270. S. C. *per* Ld. Lyndhurst, Ch. B.

the general issue ^a; and matters of law ^b in avoidance of the contract, or discharge of the action, were usually pleaded: It was also necessary to plead a tender, or the statute of limitations ^c, &c. and to plead or give a notice of set off. Anciently, matters in *discharge* of the action must have been pleaded specially ^d: Afterwards, a distinction was made between express and implied *assumpsits*; in the former, these matters were still required to be pleaded, but not in the latter ^e: At length, about the time of *Lord Holt*, they were universally allowed to be given in evidence under the general issue ^f. But now, by one of the late statutory rules of pleading ^g, it is declared that "in all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the *express* contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law: *Ex. gr.* In an action on a *warranty*, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach ^h; and, in an action on a *policy* of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against *carriers* and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against *agents* for not accounting, the plea will operate as a denial of any express contract, to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach. In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery *in point of fact*; and in the like action, for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff."

By statutory
rule of pleading.

In action on
warranty.

On policy of in-
surance.

Against carriers,
&c.

Of *indebitatus*
assumpsit.

^a *Lee v. Levy*, 4 Barn. & C. 390. 6 Dowl. & R. 475. S. C.; and see *Hall v. Cole*, 6 Nev. & M. 124.

^b *Warner v. Wainsford*, Hob. 127. *Sarsfield v. Witherly*, 2 Vent. 295.; but see *Hammond v. Teague*, 3 Moore & P. 474. 6 Bing. 197. S. C.

^c *Draper v. Glassop*, 1 Ld. Raym. 153. Gilb. C. P. 66.

^d *Paramore (or Paramour) v. Johnson*, 1 Ld. Raym. 566. 12 Mod. 376: S. C.

^e Vin. Abr. tit. *Evidence*, Z. a. Brook

v. Smith, 1 Salk. 280. Gilb. C. P. 65.

^f *Brown v. Cornish*, 1 Ld. Raym. 217. *Paramore (or Paramour) v. Johnson*, *id.* 566. 12 Mod. 376. S. C.; and see *Lawes on Pleading*, 522, 3. 1 Chit. Pl. 416. *Tidd Prac.* 9 Ed. 646, 7.

^g R. Pl. H. 4 W. IV. *Assumpsit*, reg. I. § 1. 5 Barn. & Ad. Append. vii. 10. Bing. 469. 2 Crompt. & M. 20.

^h *Power v. Barham*, 7 Car. & P. 356. 6 Nev. & M. 62. S. C.

Under the foregoing rule, we have seen ^a, it is incumbent on the plaintiff, in an action of *assumpsit*, to prove, on the plea of *non assumpsit*, the *express* contract or promise alleged in the declaration, or the matters of fact from which the contract or promise alleged may be *implied* by law. And in considering what may be given in evidence by the defendant under this plea, or must be pleaded specially in *assumpsit*, on a contract or promise, express or implied, it may be proper to take a view of the several cases which have been determined upon the subject.

When there is a joint contract, and the action is brought by one only of several parties with whom it was entered into, the non-joinder of the other parties may, it seems, be pleaded specially ^b, or may be taken advantage of at the trial on the plea of *non assumpsit*; for a joint contract with *A.* and *B.* is no contract with *A.* only ^c. But if an action be brought upon a joint contract, against one of several parties, he can only plead in abatement; although the plaintiff knew, and even contracted with the other parties ^d. And so, in actions for *wrongs*, if a party who ought to join as plaintiff be omitted, the objection can only be taken by plea in abatement ^e. If too many persons be made co-plaintiffs ^f, or co-defendants ^g, in an action upon *contract*, or co-plaintiffs in an action for a *wrong* ^h, the objection, if it appear on the record, may be taken advantage of either by demurrer, in arrest of judgment, or by writ of error; or, if the objection do not appear on the face of the pleadings, it may, it seems, be given in evidence on the plea of *non assumpsit*, as a ground of nonsuit at the trial: But in actions for *wrongs*, as they are of a joint and several nature, the plaintiff may proceed against all or any of the parties who committed them; and it is no plea in abatement, or ground of nonsuit, that there are other parties not named ⁱ. It should also be remembered, that by the law amendment act ^k, "no plea in abatement for the non-^a joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court; and unless the place of residence of such person shall be stated, with convenient

Non-joinder, or misjoinder, of parties.

By law amendment act.

^a *Ante*, 337.

^b 1 Chit. *Jur.* Pl. 361, 2.

^c 1 Chit. *Jur.* Pl. 204; and for the form of a plea of non-joinder of one of several parties to a contract, see *id.* 261; and see 1 Wms. Saund. 154. (1.) 1 Chit. Pl. 4 Ed. 34.

^d *Ante*, 318.

^e 1 Chit. Pl. 4 Ed. 55, 6.

^f *Id.* 8.

^g *Id.* 34. *Elliot v. Morgan*, 7 Car. & P. 334. *per Coleridge, J.*

^h 1 Chit. Pl. 4 Ed. 56.

ⁱ *Ante*, 318. and see 1 Chit. Pl. 4 Ed. 74, 5.

^k 3 & 4 W. IV. c. 42. § 8. *Ante*, 319.

"certainty, in an *affidavit* verifying such plea: and that to any plea
 "in abatement, in any court of law, of the non-joinder of another per-
 "son, the plaintiff may reply that such person has been discharged by
 "bankruptcy and certificate, or under an act for the relief of insolvent
 "debtors."^a

Partnership.

If the plaintiff and defendant are *partners*, and the cause of action relates to their unsettled partnership accounts^b, or if an action be brought by several plaintiffs on a joint contract, and one or more of them are liable with the defendant to the performance of it^c, the latter, not being liable to be sued thereon, may give his defence in evidence under the general issue^d. In an action on an *express* contract, want of consideration, or other matter than a direct denial of the contract, cannot be given in evidence under *non assumpsit*^e: but when the plaintiff declares in an action of *indebitatus assumpsit*, on an *implied* contract, he must it seems prove on the general issue, as a part of the contract, the consideration upon which it was founded; and the defendant will be let into evidence to prove the want of consideration^f. When the consideration for a contract, as alleged in the declaration, is *executed*^g, the defendant cannot traverse the consideration by itself, because it is incorporated and coupled with the promise, and if it were not then in fact executed, it is *nudum pactum*: but if it be *executory*, the plaintiff cannot bring his action till the consideration be performed^h; and if in truth the promise were made, and the consideration not performed, the defendant must traverse the performance, and not the promise, because they are distinct thingsⁱ.

Want of con-
sideration.

Traverse of al-
leged considera-
tion.

^a 3 & 4 W. IV. c. 42. § 9. *Ante*, 319.

^b *Smith v. Barrow*, 2 Durnf. & E. 476.
 478. *Foster v. Allanson*, *id.* 479. *Holmes v. Higgins*, 1 Barn. & C. 74. *Bovill v. Hammond*, 6 Barn. & C. 149. 151. *Green v. Beesley*, 2 Bing. N. R. 108. 2 Scott, 164. S. C. *Pearson v. Skelton*, 1 Meeson & W. 504. 1 Chit. Jun. Pl. 362. *Ante*, 327; and see *Gow on Partnership*, 3 Ed. 73, 4. *Post*, 349.

^c *Moffat v. Van Millingen*, 2 Bos. & P. 124. (c.) *Mainwaring v. Newman*, *id.* 120. *Bosanquet v. Wray*, 6 Taunt. 597. 2 Marsh, 819. S. C. *Holmes v. Higgins*, 1 Barn. & C. 74. *Milburn v. Codd*, 7 Barn. & C. 419. 1 Man. & R. 238. S. C. *Jones v. Yates*, 4 Man. & R. 613. *Hammond v. Teague*, 6 Bing. 197. 3 Moore

& P. 474. S. C.; but see *Rose v. Poulton*, 2 Barn. & Ad. 622.

^d *Worrall v. Grayson*, 1 Meeson & W. 166. 1 Tyr. & G. 477. 4 Dowl. Rep. 718. S. C.

^e *Passenger v. Brookes*, 1 Scott, 560. 1 Bing. N. R. 587. 1 Hodges, 123. 7 Car. & P. 110. S. C.; and see *Stuart v. Nicholson*, 3 Bing. N. R. 113. 121, 2.

^f *Rosc. Law Tracts*, 30.

^g For the difference between executed and executory considerations, see *Tidd Prac.* 9 Ed. 435.

^h *Sinclair v. Bowles*, 9 Barn. & C. 92. 4 Man. & R. 1. S. C.

ⁱ *Bul. Nl. Pri.* 146; and see *Tidd Prac.* 9 Ed. 435. *Passenger v. Brookes*, 1 Scott, 560. 1 Bing. N. R. 597. 1

So, where the declaration on an *express* contract is special, and charges by way of inducement certain facts, as the foundation of or consideration for the promise, it seems that those facts, if material, should be specially denied^a: For instance, in an action on the guarantee of an existing debt, in consideration of forbearance, where the declaration states, by way of inducement, that a third party was indebted, it seems to be proper to deny the debt by a special plea, that he was not indebted, &c. concluding to the country, if the defendant dispute the existence of the debt^a. So, in cases where the facts thus alleged in the declaration are true, but their operation may be defeated by some matter shewing that there really was no sufficient consideration, the latter circumstance should be introduced on the record by a special plea^a.

It has been doubted, whether the defence that there is no contract in *writing*, pursuant to the *fourth* section of the statute of frauds, may not still be given in evidence under the general issue^b: but this defence is usually pleaded^c; and from a recent decision^d it seems to be necessary. When the agreement is in *writing* and requires a stamp, the defendant may plead that it is not properly stamped; though this does not seem to be necessary, for in such case, as it cannot be received in evidence, no contract, even in fact, can be proved^e. When the plaintiff declares on an express contract, the plea of *non assumpsit* is it seems sufficient, where the defendant relies upon a material *variance* in the declaration, in setting out the contract, or contends that the true meaning thereof is mis-stated by the plaintiff^f. But in *assumpsit* for not completing the purchase of a house, the defendant cannot, under the general issue, set up as a defence, that the sale was a sale by auction, and void on the ground of puffing, which must be specially pleaded^g.

Where the defence is, that the contract has been rescinded *ab initio*, this defence seems to be admissible under the general issue; as where a horse is sold with a warranty, and power is given by the contract of

Statute of
frauds.

Want of stamp.

Variance, &c.

Contract re-
scinded, or
countermanded.

Hodges, 123. S. C. Stuart v. Nicholson, 3 Bing. N. R. 113. 121, 2; but see Taylor v. Hillary, 7 Car. & P. 30. *per Gurney*, B.

^a 1 Chit. Jun. Pl. 290.

^b Rose. Law Tracts, 36.

^c 1 Chit. Jun. Pl. 305.

^d Smith v. Dixon, 4 Dowl. Rep. 571.

1 Har. & W. 668. 11 Leg. Obs. 388.

S. C. and see Andrews v. Smith, 2

Crompt. M. & R. 627. 1 Tyr. & G. 173.

1 Gale, 335. S. C.

^e 1 Chit. Jun. Pl. 204; and see *id.*

258. *c.* Rose. Law Tracts, 36; and see

Jardine v. Payne, 1 Barn. & Ad. 663.

Anon. 13 Leg. Obs. 143. Dawson v.

Macdonald, 2 Meeson & W. 26.

^f Gwillim v. Daniell, 2 Crompt. M. &

R. 67. *per Parke*, B.

^g Icely v. Grew, 6 Car. & P. 671.

per Ld. Denman, Ch. J.

sale to the purchaser, to return the horse in case of unsoundness, and he is returned accordingly, and the seller sues in *indebitatus assumpsit* for a horse sold and delivered, it seems that, under the plea of *non assumpsit*, the defendant would be at liberty to shew the power of rescinding the contract, and that he had rescinded it accordingly^a. But where, to a declaration in *assumpsit* for the non-performance of a contract, to receive and pay for a copper made to order, at a specified price *per pound weight*, the defendants pleaded, *inter alia*, the payment into court of 15*l.* and that the plaintiff had not sustained damages to a greater amount, it was ruled that they could not, under this plea, give in evidence that they had countermanded the order, when a part only of the work had been done^b.

In action for use and occupation.

In an action for use and occupation, the fact of the premises being mortgaged by the plaintiff, and of the defendant having received notice to pay the rent to the mortgagee, may be given in evidence under the general issue, if the rent sought to be recovered accrued due after the service of the notice^c; but if otherwise, the fact must be pleaded specially^d. And where the plaintiff's title has expired, as in the case of *indebitatus assumpsit* for use and occupation, to which the defendant pleads the general issue, and insists that the plaintiff had parted with his title to the property before the period of the occupation in question, such plea appears to be proper^e.

For goods sold and delivered.

In an action of *indebitatus assumpsit* for goods sold and delivered, it is, we have seen^f, incumbent on the plaintiff to prove, on the general issue, the sale and delivery of the goods in point of fact: and the defendant will be let in to evidence to prove that the goods were not according to the sample by which they were sold^g; or, upon a contract to deliver several parcels of goods, that the vendor delivered some of them only, which the defendant returned^h. On a contract for the sale of goods at a specific price, and a subsequent delivery of the goods, it was ruled in one caseⁱ, that the defendant could not set up as a defence, that the goods were of so bad a quality as to be useless, unless he had pleaded it specially. In a subsequent case, however, it was decided, that under the plea of *non assumpsit*, or *nunquam inde-*

^a Rosc. Law Tracts, 28.

^b *Stevens v. Ufford*, 7 Car. & P. 97.

^c *Waddilove v. Barnett*, 4 Dowl. Rep. 347. 2 Bing. N. R. 538. 2 Scott, 763. 1 Hodges, 396. 11 Leg. Obs. 357, 8. S. C.

^d *Id. ib.*

^e Rosc. Law Tracts, 27, 8.

^f *Ante*, 338.

^g Rosc. Law Tracts, 13.

^h *Id.* 20.

ⁱ *Roffey v. Smith*, 6 Car. & P. 662. *per* Ld. Denman, Ch. J.; and see *Tabram v. Warren*, 1 Tyr. & G. 153. 4 Dowl. Rep. 545. S. C. *Woodhouse v. Swift*, 7 Car. & P. 310. *per* Alderson, B.

bitatus, in an action for goods sold and delivered, or for work and labour done, the defendant may prove that the goods delivered were not such as were contracted for, or that the work was done in an unworkmanlike manner, although there was a special contract to pay for the goods or work at a certain price; and the plaintiff can then only recover, according to their value, on a *quantum meruit*^a. So, in *assumpsit* for a machine sold and delivered, the court held that the defendant might shew, under the general issue, that the machine was manufactured by the plaintiff for the defendant, under a condition that if it did not work, nothing should be paid for it; that it could not be made to work, and that it was useless to the defendant^b: They also held, that although the machine was not proved to have been returned to the plaintiff, he was not entitled to any damages on the *quantum valebat*, without shewing some new implied contract, resulting from the defendant's conduct or dealing with the goods^b.

Where goods have been sold on credit, and the action is brought before the time of credit is expired, this defence is, it seems, open to the defendant under the plea of *non assumpsit*, or *nunquam indebitatus*, and need not be pleaded specially; for if the period of credit was not expired when the action was commenced, the plaintiff proves a different contract from that which he has stated in his declaration, viz. to pay on request^c. It has been doubted whether, in an action for goods sold and delivered to the defendant's wife, her adultery should be pleaded specially, or may be given in evidence on the plea of *non assumpsit*^d.

Time of credit
not expired, &c.

In *assumpsit* for goods bargained and sold, it has been decided that evidence of a special written contract, the conditions of which have not been complied with, may be given under the plea of *non assump-*

In action for
goods bargained
and sold.

^a *Cousins v. Paddon*, 2 Crompt. M. & R. 547. 5 Tyr. Rep. 535. 1 Gale, 305. 4 Dowl. Rep. 488. S. C. *Dicken v. Neale*, 1 Meeson & W. 556. 5 Dowl. Rep. 176. 12 Leg. Obs. 195, 6. S. C.; and see *Rosc. Law Tracts*, 40.

^b *Grounell v. Lamb*, 1 Meeson & W. 352; but see *Morgan v. Richardson*, 1 Campb. 40. n. 7 East, 482. *Tye v. Gwynne*, 2 Campb. 346. *Obbard v. Betham*, 5 Man. & R. 632.

^c *Taylor v. Hillary*, 1 Crompt. M. & R. 741. 5 Tyr. Rep. 373. 3 Dowl. Rep. 461. 1 Gale, 23. 9 Leg. Obs. 494. S. C. per *Purke*, B. *Knapp v. Harden*, 1 Gale,

47. *Cousins v. Paddon*, 2 Crompt. M. & R. 553. 5 Tyr. Rep. 535. 4 Dowl. Rep. 488. S. C. *Jones v. Nanney*, 1 Meeson & W. 336. 1 Tyr. & G. 638. 5 Dowl. Rep. 90. S. C. per *Purke*, B. *Broomfield v. Smith*, 1 Meeson & W. 542. 1 Chit. Jun. Pl. 204. 291. 378, 9; but see *Edmunds v. Harris*, 6 Car. & P. 547. 4 Nev. & M. 182. 2 Ad. & E. 414. S. C.; and see *Rosc. Law Tracts*, 21, 2.

^d *Symes v. Goodfellow*, 2 Bing. N. R. 532. 2 Scott, 769. 1 Hodges, 400. 4 Dowl. Rep. 642. 11 Leg. Obs. 310, 11. S. C.; and see 1 Chit. Jun. Pl. 313. (3.)

sit, to a declaration in the common form^a: But a defendant, in an action for goods bargained and sold at a specific price, will not be allowed to shew, either in bar of the action or in mitigation of damages, that there was a false representation of the quality of the goods, unless it be specially pleaded^b. And in *assumpsit* for the price of a copyright bargained and sold, a defence, on the ground that the copyright was not assigned in writing, must be specially pleaded^c.

Work and labour.

In an action for work and labour, the plaintiff must prove, on the plea of *non assumpsit*, the work done for the defendant, and that it was done at his request, under a special contract to be paid for it at a certain sum; or, if there was no fixed price, what it was reasonably worth, upon a *quantum meruit*. On the other hand, the defendant, we have seen^d, may prove on the general issue, that the work was done in an unworkmanlike manner, although there was a special contract to pay for it at a certain price, and the plaintiff can then recover only on a *quantum meruit*^e; or, in an action by an attorney, a special agreement may be proved, that the plaintiff should receive no remuneration, but only his disbursements^f. And where a plaintiff relies upon a mercantile custom, to support his claim for commission to a certain amount, the defendant may, without any special plea, produce evidence to shew that, under certain circumstances, the custom is to pay but half that amount; the evidence being offered to shew that the contingent reduction was part of the original contract, and not that it was a subsequent alteration, so as to create a new contract^g. In an action for an apothecary's bill, the objection that the plaintiff was not in practice as an apothecary prior to or on the 5th of August 1815, and had not obtained his certificate from the society of apothecaries, need not be pleaded, but may be rendered available under *non assumpsit*^h; for the statute 55 Geo. III. c. 194. § 21. has made the proof of the practice, or certificate, a condition precedent to the plaintiff's recovery, and therefore he must prove it as part of his caseⁱ.

Apothecary's bill.

^a Gardner v. Alexander, 3 Dowl. Rep. 146. 9 Leg. Obs. 237. Alexander v. Gardner, 1 Scott, 281. S. C.

^b Woodhouse v. Swift, 7 Car. & P. 810. per Alderson, B.

^c Barnett v. Glossop, 1 Bing. N. R. 633. 1 Scott, 621. 3 Dowl. Rep. 625. 10 Leg. Obs. 28. S. C.

^d *Ante*, 345.

^e Cousins v. Paddon, 2 Crompt. M. &

R. 547. 557. 5 Tyr. Rep. 535. 1 Gale, 305. 4 Dowl. Rep. 488. S. C.; and see Basten v. Butter, 7 East, 479. Cooper v. Whitehouse, 6 Car. & P. 545. per Alderson, B.

^f Jones v. Nanny, 1 Meeson & W. 333. 1 Tyr. & G. 634. 5 Dowl. Rep. 90. 12 Leg. Obs. 102. S. C.

^g Broad v. M'Aylmer, 1 Har. & W. 532.

^h Morgan v. Ruddock, 4 Dowl. Rep.

In an action by an attorney for his bill of costs, the defendant may plead that the plaintiff was not an attorney^a, or that his admission became void by reason of his neglect to take out his certificate; or he may plead in bar of the action, that the contract on which it is founded was void on the ground of champerty^b. It has been doubted, whether in an action on an attorney's bill, the non-delivery of a signed bill, a month before the commencement of the action, can be taken advantage of under the general issue, or ought to be pleaded specially^c: It is said, in one case^d, to have been ruled at *nisi prius*, that such a defence cannot be rendered available under the general issue; but one of the learned judges^e inclined to think that it might, and therefore it was not necessary that it should be pleaded specially^f. And the defendant may it seems be let in to prove, on the general issue, that the charges contained in the plaintiff's bill were brought upon his client by his inadvertence^g; or for work which was useless towards accomplishing the object his client had in view, although performed through inadvertence or inexperience, and not with a design of imposing on the client^h. And although, in an action on an attorney's bill, the defendant pay money into court, he is still at liberty to shew that the business in question was agreed to be done for costs out of pocketⁱ. In considering an attorney's bill, the jury may discard an *item* for work entirely useless; though upon an *item* for work partly useless, or in respect of which there has been any

By attorney, for his bill of costs.

311. 1 Har. & W. 505. S. C.

^a 1 Chit. Jun. Pl. 234.

^b Com. Dig. tit. *Attorney*, (B. 14.) *Box v. Barnaby*, Hob. 117; and see *Saunderson v. Glass*, 2 Atk. 296. 298. *Newman v. Payne*, 4 Bro. Chan. Cas. 350. *Wallis v. Portland*, 3 Ves. 494. *Stephens v. Bagwell*, 15 Ves. 156. *Wood v. Downes*, 18 Ves. 126. *Montesquieu v. Sandys*, *id.* 313. in Chan. *Guy v. Gower*, 2 Marsh. 273. *Thwaites v. Mackerson*, 3 Car. & P. 341. 1 Moody & M. 199. S. C.; but see *Potts v. Sparrow*, 6 Car. & P. 749. *per Tindal*, Ch. J. *Ex parte Yeatman*, 4 Dowl. Rep. 204. 1 Har. & W. 510. 11 Leg. Obs. 166. S. C. 1 Chit. Jun. Pl. 243.

^c *Beck v. Mordaunt*, 4 Dowl. Rep. 112. 2 Scott, 178. 1 Hodges, 196. 10 Leg. Obs. 460, 61. S. C.

^d *Id. ib.*; and see *Moore v. Boulcott*,

1 Scott, 122. 1 Bing. N. R. 323. 3 Dowl. Rep. 145. 9 Leg. Obs. 236. S. C. where it was specially pleaded. 1 Chit. Jun. Pl. 237, 8.

^e Mr. Justice Park.

^f *Beck v. Mordaunt*, 4 Dowl. Rep. 112. 1 Hodges, 196. 2 Scott, 178. 10 Leg. Obs. 460, 61. S. C.; and see *Morgan v. Ruddock*, 4 Dowl. Rep. 311. 1 Har. & W. 505. S. C.

^g *Montrou v. Jefferys*, 2 Car. & P. 113.

^h *Hill v. Featherstonhaugh*, 7 Bing. 569. 5 Moore & P. 541. S. C.; and see *Randall v. Ikey*, 4 Dowl. Rep. 682, 3. 12 Leg. Obs. 196. S. C. And for the forms of special pleas, in similar cases, see 1 Chit. Jun. Pl. 239, 40, 41.

ⁱ *Jones v. Read*, 1 Nev. & P. 18. 5 Dowl. Rep. 216. 13 Leg. Obs. 29. S. C.

negligence, the client's remedy is only by a cross action^a. But in *assumpsit* by an attorney, to recover his bill of costs, it cannot be objected, under a plea of *non assumpsit*, that the costs were incurred in preparing and enforcing agreements which had been declared illegal^b. So, an action by an attorney for his charges incurred in selling or mortgaging the property of a party confined in prison for debt, after such party has petitioned the insolvent court for his discharge, cannot be resisted on the ground that such sale or mortgage was fraudulent, as against the creditors of the insolvent^c: The only ground, it would seem, on which such an action can be defended is, that the insolvent could derive no benefit from the plaintiff's skill^c.

For money
lent.

Money paid.

In *assumpsit* for money lent, the defendant pleaded *non assumpsit*, and a bottomry bond accepted in satisfaction of the debt; and both issues having been found for the plaintiff, the court refused a new trial, which was applied for on the ground that a bond having been given, the implied promise to pay did not arise^d. To an action of *assumpsit* for money paid, the defendant pleaded, first, the general issue; secondly, as to part of the money, that it was paid to the defendant's use, in respect of one sixteenth share of the damages and costs recovered in an action which was brought by certain parties against the plaintiff, wherein they complained against the plaintiff as the owner of a vessel, of which the defendant was a part owner to the extent of one sixteenth share, in respect of the loss of certain goods shipped on board the said vessel, to be carried from *A.* to *B.* and which loss was alleged in the said action to have happened through the negligence of the plaintiff by his servants; and the defendant then averred, that the said loss was not wholly caused by the negligence of the plaintiff by his servants, but that the same happened through the personal misconduct of the plaintiff; thirdly, that although the defendant was the legal owner of a sixteenth part of the vessel at the time the goods were shipped, and continued to be such owner when they were lost, yet he did not concur with the plaintiff and the other part owners of the said vessel in the employment thereof on the said voyage, but that the said voyage was undertaken for the advantage and at the risk of the plaintiff and certain other persons, and without the defendant being concerned in the adventure; and the court held, on

^a *Shaw v. Arden*, 9 Bing. 287. 2 Moore Rep. 680. S. C.

& S. 341. 1 Dowl. Rep. 705. S. C.

^c *Tabram v. Warren*, 1 Tyr. & G. 153.

^b *Potts v. Sparrow*, 1 Hodges, 135. 1

^d *Weston v. Foster*, 2 Bing. N. R.

Scott, 578. 1 Bing. N. R. 594. 3 Dowl.

693. 3 Scott, 155. S. C.

special demurrer, that the second and third pleas were bad, as they amounted to the general issue^a. But where the defendants in *assumpsit*, had pleaded specially that the policies of insurance in respect of which the monies sought to be recovered were alleged to have been paid to the use of the defendants, were so made as to be useless, and the plaintiffs had demurred specially, on the ground that the plea amounted to the general issue, and that it was argumentative, the court appeared to think that the plea was good, but allowed the plaintiffs to withdraw their demurrer, and to reply *de novo*, without costs^b.

In an action for money had and received, a plea of *non assumpsit*, we have seen^c, will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff. In order to recover *interest*, the plaintiff must prove on the general issue, either that there was an express agreement to pay it by the defendant, for money lent him, or on the forbearance of a pre-existing debt, or that it was payable by the usage and course of dealing between the parties^d. In an action on an account stated, the defendant cannot now, under the plea of *non assumpsit*, give in evidence a subsequent account alleged to be in his favour^e. And where, in *assumpsit* for money paid to the defendant's use and on an account stated, the defendant pleaded that at the time of the accruing of the cause of action, the plaintiff and defendant carried on business in copartnership, and that the causes of action arose out of transactions between them as such copartners, and that at the commencement of the suit the accounts of the partnership were not settled, nor any balance struck, the plea was holden bad on special demurrer: because, first, it did not distinctly state that the money was paid in respect of a partnership transaction; secondly, if it did, it amounted to the general issue; and thirdly, as pleaded to the account stated, it also amounted to the general issue^f.

Money had and received.

Interest.

On account stated.

^a Gregory v. Hartnoll, 1 Tyr. & G. 308. 1 Meeson & W. 188. 4 Dowl. Rep. 695. S. C.

^b Cole v. Le Souef, 3 Scott, 188. 5 Dowl. Rep. 41. 12 Leg. Obs. 323, 4, 5. S. C.

^c *Ante*, 340.

^d For the cases in which interest was formerly and is now recoverable, and in

what not, see Tidd *Prac.* 9 Ed. p. 871, 2. *Post*, Chap. XXXVII.

^e Fidgett v. Penny, 2 Dowl. Rep. 714. 1 Cromp. M. & R. 108. 4 Tyr. Rep. 650. 1 Chit. *Jun.* Pl. 204, 5. S. C.

^f Worrall v. Grayson, 1 Tyr. & G. 477. 1 Meeson & W. 166. 4 Dowl. Rep. 718. S. C. *Ante*, 342.

In every species
of *assumpsit*.

In every species of *assumpsit*, it is declared by another statutory rule of pleading^a, that "all matters in confession and avoidance, including not only those by way of *discharge*, but those which shew the transaction to be either *void* or *voidable* in point of law, on the ground of fraud or otherwise^b, shall be specially pleaded: *Ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded." The defendant therefore must, by this rule, in every species of *assumpsit*, plead specially in avoidance of the contract^b, or of his liability thereon by subsequent or collateral matter, or in *discharge* of the cause of action^c, such of the pleas which have been before enumerated, as are adapted to his defence. And where a plea in bar is in confession and avoidance, it must directly confess and avoid the matters alleged in the declaration: Therefore a plea, to an action of *debt* for goods sold and delivered and on an account stated, that the defendant was discharged by order of the insolvent debtors' court, of and from the several debts and causes of action, *if any*, in the declaration mentioned, is bad on special demurrer, for hypothetically, and not directly, confessing the cause of action sought to be avoided^d.

Breach.

The *breach* of the contract not being denied by the plea of *non assumpsit*, must, if not admitted, be denied specially by the defendant, either *affirmatively* or *negatively*. If the breach be in the *negative*, as for non-payment of money, the defendant should plead *affirmatively* that he paid it, either when it became due, according to his promise, or afterwards, and before the commencement of the action; in which latter case the plea should allege that it was paid to and accepted by the plaintiff, in satisfaction of his demand. If the breach be in the *affirmative*, then, of course, the plea in denial of it should be in the *negative*, concluding to the country.

Damages.

A plea can only be applied to the breach of contract alleged, and not to the special damage laid as resulting from such breach^e: Nor

^a R. Pl. H. 4 W. IV. *Assumpsit, reg.*
I. § 3. 5 Barn. & Ad. Append. viii. 10
Bing. 470. 2 Crompt. & M. 21.

^b Barnett v. Glossop, 1 Bing. N. R.
633. 1 Scott, 621. 3 Dowl. Rep. 625. 10
Leg. Obs. 28, 9. S. C.

^c Weston v. Foster, 2 Bing. N. R. 693.

3 Scott, 155. S. C.

^d Gould v. Leabury, (or Raspberry,) 4
Tyr. Rep. 863. 1 Crompt. M. & R. 254.
2 Dowl. Rep. 707. S. C.; and see Mar-
getts v. Bayes, 1 Har. & W. 685. 6 Nev.
& M. 228. S. C.

^e Porter v. Izat, 1 Tyr. & G. 639.

can a plea confess the whole of the breach alleged, and then offer to pay into court a sum in satisfaction only of a part particularly described in the plea, and not of the whole consequences of the matter alleged in the declaration by way of special damage ^a. But there being it seems no mode of traversing the damages laid in the declaration specially, in an action of *assumpsit*, the defendant is allowed to give evidence, in reduction of them, under the plea of *non assumpsit* ^b. And in an action against the acceptor of a bill of exchange, part payment may be given in evidence, under a plea denying the acceptance, in reduction of damages ^c.

In all actions upon bills of exchange and promissory notes, including actions of *debt* as well as *assumpsit*, the plea of *non assumpsit* is declared to be inadmissible, by one of the late statutory rules of pleading ^d; and by another of them ^e, "the plea of *nil debet* shall not be allowed in any action." In actions therefore, on bills or notes, the defendant by his plea must deny specially some particular matter of fact alleged in the declaration, such as the drawing ^f, or making ^g, or indorsing ^h, or accepting ⁱ, or presenting ^k, or notice of dishonour ^l, of the bill or note ^m; or he must plead specially in confession and avoidance ⁿ.

Pleas in actions upon bills of exchange, and promissory notes.

In denial, or confession and avoidance.

When the action is between the original parties, whose names appear on the face of the bill or note, as by the drawer against the acceptor of a bill, or by the payee against the maker of a note, the defendant may plead that the bill was accepted, or note drawn, for the accommodation of the plaintiff, and for his use and benefit, &c., (*as the case may be*), and without any consideration or value

Want or failure of consideration.

^a *Porter v. Izat*, 1 Tyr. & G. 639.

^b *Rosc. Law Tracts*, 41.

^c *Shirley v. Jacobs*, 4 Dowl. Rep. 136. 2 Bing. N. R. 88. 2 Scott, 157. 1 Hodges, 214. 7 Car. & P. 3. S. C.; and see *Cousins v. Paddon*, 2 Crompt. M. & R. 547. 5 Tyr. Rep. 535. S. C.

^d *R. PL H. 4 W. IV. Assumpsit, reg.* I. § 2. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 21.

^e *Id. tit. Covenant, and Debt, reg. II.* § 2. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 21.

^f 1 Chit. Jun. Pl. 255. (7.)

^g *Id.* 372. (1.)

^h *Id.* 255. (6.); but see *Gilmore v. Hague*, 4 Dowl. Rep. 303. 1 Har. & W. 523. 11 Leg. Obs. 116. S. C.

ⁱ 1 Chit. Jun. Pl. 253. (1.)

^k *Id.* 254. (2.) 255. (9.) 256. (10. 12.)

^l *Id.* 256. (11.) 257. (15.)

^m *R. PL H. 4 W. IV. Assumpsit, reg.* I. § 2. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 21.

ⁿ *Id. Covenant and Debt, reg. II.* § 4. 5 Barn. & Ad. viii. 10 Bing. 470. 2 Crompt. & M. 22.

for the same ^a; or that it was accepted or drawn for a consideration which has failed, stating the circumstances ^b. But in an action by the drawer against the acceptor of a bill of exchange, a plea is repugnant, which shews a consideration for the acceptance of the bill by the defendant, and concludes that he has not received any value or consideration for the payment thereof ^c. So a plea, in a similar action, that the defendant received no consideration from the plaintiff for accepting the bill, is insufficient ^d: and it is no defence thereto, that the consideration has partially failed, on account of the badness of the quality and improper stowage of goods, for the price of which it was drawn ^e. So, in an action on a bill of exchange, by an indorsee against his immediate indorser, a plea that the defendant indorsed the bill to the plaintiff, without having or receiving, and that he has not at any time had or received any value or consideration for the indorsement, would be bad on special demurrer ^f; though it was holden to be good after verdict ^g: For, as was observed by Lord Abinger, in delivering the judgment of the court, 'the new regulations in pleading were intended to oblige the defendant to set out on the record, the transactions which he means to produce in evidence, to shew that the plaintiff had no foundation for his action, so as to give the plaintiff, by the plea, notice of what the real objection is, upon which the defendant means to rely; as for example, that it was an accommodation bill, or given for a consideration which afterwards failed, or on a gambling transaction, &c.: Of such defences, *prima facie* proof must be given by the defendant, to entitle him to call upon the plaintiff for an answer, by proof of a consideration.' ^h So, in an action by the payee against the maker of

^a Batley v. Catterall, 1 Moody & R. 379; and see Thompson v. Clubley, 1 Meeson & W. 212. Chit. Jun. on Bills, 100, f, &c. 1. l. (21.) 1 Chit. Jun. Pl. 260, &c.

^b 1 Chit. Jun. Pl. 269. (39, 40.); and see Connop v. Holmes, 1 Tyr. & G. 85. 4 Dowl. Rep. 451. S. C. Adams v. Wordley, 1 Meeson & W. 374. 1 Tyr. & G. 620. S. C.

^c Byass v. Wylie, 1 Crompt. M. & R. 686. 5 Tyr. Rep. 377. 3 Dowl. Rep. 524. 1 Gale, 50. 10 Leg. Obs. 45, 6. S. C.

^d Graham v. Pitman, 5 Nev. & M. 37. 3 Ad. & E. 521. S. C.

^e Tye v. Gwynne, 2 Campb. 346; and

see Morgan v. Richardson, 1 Campb. 40. n. 7 East, 482. Obbard v. Betham, 5 Man. & R. 632.

^f Easton v. Fratchett, 1 Gale, 30. 1 Crompt. M. & R. 798. 4 Tyr. Rep. 472. 3 Dowl. Rep. 472. 9 Leg. Obs. 492. 6 Car. & P. 786. S. C. 2 Crompt. M. & R. 542. 4 Dowl. Rep. 549. 1 Gale, 250. S. C. in Error; and see Stoughton v. Earl of Kilmorey, 2 Crompt. M. & R. 72. 5 Tyr. Rep. 568; 3 Dowl. Rep. 705. 1 Gale, 91. 10 Leg. Obs. 316. S. C. Mills v. Oddy, 1 Gale, 92. 2 Crompt. M. & R. 103. 5 Tyr. Rep. 571. 3 Dowl. Rep. 722. S. C. Paplie v. Codrington, 4 Dowl. Rep. 497.

^g Easton v. Fratchett, 1 Crompt. M. &

a promissory note, a plea that it was given without any consideration, was holden to be bad on demurrer ^a: and it was said by Mr. Baron *Parke*, that 'in the examples given to the rules ^b, declaring that every matter in confession and avoidance, in actions of *assumpsit*, should be pleaded specially, the instance of the drawing, indorsing, accepting, &c. bills or notes by way of accommodation, was advisedly inserted.' ^c

In an action by the indorsee against the acceptor of a bill of exchange, it is competent to the acceptor to plead that the acceptance was for the accommodation of the plaintiff, and that he has received no consideration from the drawer, and that it was agreed that the bill, when due, should be taken up by the plaintiff ^d. So the defendant, in such an action, may plead that he accepted the bill for the accommodation of the drawer who indorsed it to the plaintiff, without consideration ^e; or that the bill was accepted without consideration, and delivered to the drawer, to be discounted by him for the defendant, and that the drawer wrongfully indorsed it to the plaintiff, who took it with notice ^f; or that it was an accommodation acceptance, and taken by the plaintiff after it became due ^g. But in an action on a bill of exchange, by an indorsee against the acceptor, a plea that the bill was accepted without any consideration passing from the drawer to the acceptor, was held bad on demurrer ^h, without shewing circumstances of fraud, and knowledge of them on the part of the plaintiff ^h. So, a plea that there was not at any time any consideration for the defendant's acceptance, or paying the bill of exchange, was held bad on special demurrer ⁱ. And, in an action by the second indorsee against the payee and first indorser of a promissory note, a plea that the defendant never had any consideration for indorsing the note, and that the second indorser indorsed it to the plaintiff without any consideration, and that the plaintiff always held it without any

In action by indorsee against acceptor of bill of exchange.

R. 798. 1 Gale, 32, 3. 4 Tyr. Rep. 472.
L. m. 3 Dowl. Rep. 482. S. C. 2 Crompt.
M. & R. 542. 4 Dowl. Rep. 549. 1
Gale, 250. S. C. in Error.

^a *Stoughton v. Earl of Kilmorey*, 1
2 Crompt. M. & R. 72. 5 Tyr. Rep. 568.
3 Dowl. Rep. 705. 1 Gale, 91. 10 Leg.
Obs. 216. S. C.

^b R. Pl. H. 4 W. IV. *Assumpsit*, reg. I.
§ 3. *Ante*, 350.

^c 2 Crompt. M. & R. 74.

^d *Thompson v. Clibley*, 1 Meeson &
W. 212.

^e *Chit. Jun. Pl.* 262. (26.)

^f *Id.* 263. (31.)

^g *Id.* 265. (34.); and see *id.* 264. (33.)
266. (36.) *Chit. Jun. on Bills*, 100. i. j. k.
m. m. (32.)

^h *Lowe v. Chifney*, 1 Scott, 95. 1
Bing. N. R. 267. S. C.; *French v.*
Archer, 3 Dowl. Rep. 130.; and see *Simp-*
son v. Clarke, 2 Crompt. M. & R. 342. 1
Gale, 237. 5 Tyr. Rep. 593. 10 Leg.
Obs. 296. S. C.

ⁱ *Reynolds v. Iveney*, 3 Dowl. Rep.
453. 9 Leg. Obs. 430. S. C.

consideration, is bad on demurrer^a. So where, to a declaration on bills of exchange, by the indorsees against the acceptor, the defendant pleaded, first, that the bills were accepted for the accommodation of the indorser, and without any consideration for the acceptance, and that they were indorsed to the plaintiffs after they became due; secondly, that the bills were indorsed after they became due, and that before the indorsement, the indorser was indebted to the defendant in a sum of money exceeding the amount of the bills; the court held that the pleas were ill, but gave the defendant leave to amend^b. And where, in an action by the third indorsee against the drawer of a bill of exchange, the defendant pleaded that his first indorsement was in blank, and that he delivered it to *A. B.* to discount or the defendant; that *A. B.* held the bill until he transferred and indorsed it to *C. D.* without discounting it for the defendant, under pretence of securing a debt due from *A. B.* to *C. D.* the latter having notice, and that the plaintiff took the bill with notice, the court held, after pleading over, that the plea was bad; for as there was no averment that the defendant had at no time received any consideration, the plea was consistent with a consideration given to him by *A. B.*^c

Illegality of
consideration,
&c.

Other grounds of defence, which may be made the subject of special pleas in actions on bills of exchange or promissory notes, are illegality of consideration^d, as that the bill or note was given upon a usurious contract^e, or for gaming^f, &c. or was obtained by fraud^g, or altered without consent of the defendant^h; or that the bill has been

^a *Trinder v. Smedley*, 1 Har. & W. 309. 3 Ad. & E. 522. 5 Nev. & M. 138. S. C.

^b *Stein v. Yglesias*, 1 Crompt. M. & R. 565. 5 Tyr. Rep. 172. 3 Dowl. Rep. 252. S. C. *per Parke*, B.; and see *Same v. Same*, 1 Gale, 98. *Goodall v. Ray*, 4 Dowl. Rep. 76. 1 Har. & W. 333. 10 Leg. Obs. 508, 9. S. C.

^c *Noel v. Rich*, 1 Gale, 225. 2 Crompt. M. & R. 360. 5 Tyr. Rep. 632. 4 Dowl. Rep. 228. 11 Leg. Obs. 135, 6. S. C.; and see *Noel v. Boyd*, 1 Tyr. & G. 211. 4 Dowl. Rep. 415. 11 Leg. Obs. 500, 501. S. C.

^d 1 Chit. *Jun.* on Bills, &c. 100. *k. l.*; and see *Davis v. Holding*, 1 Meeson & W. 159. 1 Tyr. & G. 371. S. C.

^e 1 Chit. *Jun.* Pl. 278. (54.); but see stat. 58 Geo. III. c. 93. 3 & 4

W. IV. c. 98. § 7. *Connop v. Yeates*, 4 Nev. & M. 302. 2 Ad. & E. 326. S. C. stat. 5 & 6 W. IV. c. 41.

^f 1 Chit. *Jun.* on Bills, &c., 100, *n.* *Boulton v. Coghlan*, 1 Hodges, 145. 1 Scott, 588. S. C.; but see stat. 5 & 6 W. IV. c. 41.

^g 1 Chit. *Jun.* on Bills, &c., 100. *n. n.* (25.) 1 Chit. *Jun.* Pl. 270, 71, 2. (41. 43. 45.)

^h 1 Chit. *Jun.* Pl. 258, 9, 60. (20, 21, 2.) *Barker v. Malcolm*, 7 Car. & P. 101; and see *Cock v. Coxwell*, 4 Dowl. Rep. 187. 2 Crompt. M. & R. 291. 1 Gale, 177. S. C. where, in an action on a bill of exchange, by an indorsee against the acceptor, the defendant pleaded that he did not accept the bill, the court held that it was competent for him, under this plea, to give in evidence that since he accepted it,

indorsed over to a third person^a, or lost by the plaintiff^b; or, in an action against the drawer of a bill, or indorser of a note, that the defendant is discharged by the plaintiff's having given time to the acceptor, or maker^c: and, in an action by the indorsee of a bill of exchange against the acceptor, the defendant may, it seems, plead that the bill was accepted for a debt from which he was discharged under the insolvent debtors' act; or to induce the drawer not to oppose the discharge of the defendant under that act, of which the plaintiff, at the time of the indorsement, had notice^d. But, in an action on a bill of exchange, by indorsee against acceptor, a plea alleging only that the acceptance was obtained by fraud, is bad^e. So, where a plea stated the consideration of a bill of exchange to be a sale of goods abroad to the defendant, who was an *Englishman*, as the plaintiff well knew, at a small price, being less than their real value, for the purpose of the defendant's getting them smuggled into *England*, but did not shew any participation by the plaintiff in the illegal purpose of the defendant, it was holden, on demurrer, to be a bad plea^f. So, in an action on a bill of exchange, a plea that the consideration was cash paid by the plaintiffs as bankers, on drafts made more than *fifteen* miles from their place of business, &c. was holden bad, after pleading over; it containing no allegation that the drafts were payable to bearer, or on demand, or that the amount of any of them was *forty* shillings^g.

In an action on a bill of exchange, a plea that after it became due, the defendant paid the amount, and that the holder never sustained any damage by reason of the non-payment thereof at maturity, concluding to the country, was holden to be bad, on special demurrer^h; and it seems that such a plea would not be good, even if it con-

Other grounds
of defence.

a material alteration was made in the date, which vitiated the bill: If the drawer, however, sue the acceptor of a bill, and fail, in consequence of having altered it in a material part, he may still recover upon counts on the original consideration. *Atkinson v. Hawdon*, 2 Ad. & E. 628.

^a 1 Chit. Jun. Pl. 278. (46.) *La Forest v. Langan*, 4 Dowl. Rep. 642.

^b 1 Chit. Jun. Pl. 273. (47.)

^c *Id.* 276. (52.); and see *Hall v. Cole*, 6 Nev. & M. 124.

^d *Warner v. Haines*, 6 Car. & P. 666; and see *Davis v. Holding*, 1 Meeson & W. 159. 1 Tyr. & G. 371. S. C.

^e *Bramah v. Baker, (or Roberts)*, 1 Bing. N. R. 469. 1 Scott, 350. 1 Hodges, 66. 3 Dowl. Rep. 392. 9 Leg. Obs. 460. S. C. *Connop v. Holmes*, 1 Tyr. & G. 85. 4 Dowl. Rep. 451. S. C.

^f *Pellecat v. Angel*, 1 Gale, 187. 2 Crompt. M. & R. 311. S. C. *Ante*, 324.

^g *Greene v. Allday*, 1 Gale, 218; and see *Anon.* 13 Leg. Obs. 143. 1 Chit. Jun. Pl. 277. *M'Dowall v. Lyster*, 2 Meeson & W. 52. *Jenkins v. Creech*, 5 Dowl. Rep. 293. S. C.

^h *Chapman v. Vandevelde*, 1 Har. & W. 685.

cluded with a verification, unless it went on to allege that the payment was accepted in satisfaction ^a. So, in *assumpsit* by the indorsee against the indorser of a bill of exchange, it is a bad plea to plead that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill, after notice to him of the non-payment; for the cause of action accrued against the defendant immediately on his receiving the notice of dishonour ^b. And, in an action against the maker of a promissory note, payable at a given time, it is an inadmissible defence that there was an agreement, that on a certain event happening, no action should be brought ^c.

In discharge.

The pleas in *discharge*, in actions on bills of exchange or promissory notes, are similar to those which have been already noticed in other actions of *assumpsit* ^d. And it has been decided, that a plea to an action on a bill of exchange for 43*l.* by an indorsee against the acceptor, that after the bill became due, the drawer gave the plaintiff his promissory note for 44*l.* in full satisfaction, and that the plaintiff accepted it in satisfaction, is a good answer to the action ^e. So where, to an action on a bill of exchange by an indorsee against the acceptor, the defendant pleaded that after it became due, he gave to the holders a bill for a larger sum, and that they accepted it in satisfaction of the first bill, and afterwards indorsed it to one *F. S.* to whom the money was afterwards paid, in satisfaction of the first bill, and of all damages sustained by the plaintiff by reason of its non-payment, and that the indorsement to the plaintiff of the first bill was after the second bill had been given, but the plea did not allege that the second bill was negotiable, the court held, on special demurrer, that the plea was sufficient ^f.

What may be given in evidence on *non est factum*, or must be specially pleaded, in covenant.

In *covenant* there is, properly speaking, no general issue; for though the defendant may plead *non est factum*, yet that only puts the deed in issue, and not the breach of covenant; and *non infregit conventionem* is a bad plea ^g. In this action, however, the defendant might formerly have given in evidence, on the plea of *non est factum*, that

^a *Chapman v. Vandervelde*, 1 Har. & W. 685.

^b *Siggers v. Lewis*, 4 Tyr. Rep. 847. 1 Cramp. M. & R. 370. 2 Dowl. Rep. 681. S. C.

^c *Forster v. Sibley*, 1 Gale, 10.

^d *Ante*, 328.

^e *Sard v. Rhodes*, 4 Dowl. Rep. 743. 1 Meeson & W. 153. 1 Tyr. & G. 298. 12 Leg. Obs. 212, 13. S. C.

^f *Lewis v. Lyster*, 4 Dowl. Rep. 377. 1 Tyr. & G. 185. 1 Gale, 320. S. C. 11 Leg. Obs. 483. S. C.; and see *Goldshede v. Cottrell*, 2 Meeson & W. 20.

^g *Walsingham v. Comb*, 1 Lev. 183. 1 Sid. 289. S. C. *Pitt v. Russell*, 3 Lev. 19. *Hodgson v. East India Company*, 8 Durnf. & E. 278. *Monk v. Noyes*, 1 Car. & P. 265. *per Abbott*, Ch. J. *id.* (a.); and see *Tidd Prac.* 9 Ed. 648.

the deed declared on was delivered as an *escrow*, on a condition not performed; or that it was void at common law *ab initio*, as being made by a married woman, lunatic, &c.; or that it afterwards became void by erasure, alteration, or cancelling ^a: But now, by one of the late statutory rules of pleading ^b, it is declared that "in *covenant*, the plea of *non est factum* shall operate as a denial of the execution of the deed, in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." In this action, therefore, the defendant must specially controvert the deed, by shewing that it is *void* or *voidable*, at common law or by statute, or plead that he has *performed* the covenant, or is legally *excused* from its performance; or, admitting the breach, that he is *discharged* by matter *ex post facto*, as a release, &c.: And a *tender* may be pleaded in *covenant*, for the payment of money ^c. In *covenant* by a patentee, brought to recover rent reserved in respect of a licence to use an invention, it was doubted whether a plea merely alleging that the invention was not new, or that the plaintiff was not the first inventor, without shewing that the defendant had in consequence failed to have the exclusive enjoyment covenanted for, was a good plea, by analogy to a plea of eviction ^d. And where a licence to use certain patent machines is granted by indenture, in which it is recited that the grantor has *invented* the machines, and has obtained letters patent for the sole use of the invention, and enrolled the specification, parties and privies to the deed are estopped from pleading either that the invention is not a *new* invention, or that the grantor was not the *first* inventor, or that no specification was enrolled ^e.

By statutory rule, and decisions thereon.

In actions of *debt* on specialty, the general issue of *non est factum* was formerly allowed, in all cases where the deed was not properly executed ^f, or varied from the declaration ^g; and the defendant might have given in evidence under it, as on the plea of *non est factum*

In debt on specialty.

^a *Post*, 358.

^b R. 1st 11. 4 W. IV. *Covenant* and *Debt*, reg. 11. § 1. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Cramp. & M. 21.

^c *Johnson v. Clay*, 7 Taunt. 486. 1 Moore, 200. S. C.; and see *Tidd Prac.* 9 Ed. 648. 1 Chit. Pl. 428. And for pleas in *covenant*, see 3 Chit. Pl. 5 Ed. 1001, &c. and for replications thereto, *id.* 1185.

^d *Bowman v. Taylor*, 4 Nev. & M. 264. 2 Ad. & E. 278. S. C.; and see

Bowman v. Rostron, 4 Nev. & M. 552. 2 Ad. & E. 295. S. C.

^e *Id.*

^f *Hill v. Manchester and Salford Water Works Company*, 2 Nev. & M. 573. 5 Barn. & Ad. 866. S. C.

^g Com. Dig. tit. *Pleader*, 2 W. 18; and see *Morgan v. Edwards*, 6 Taunt. 394. 2 Marsh. 96. S. C. *Hoar v. Mill*, 4 Maule & S. 470.

in *covenant*^a, that the deed was delivered as an *escrow*^b to a third person, on a condition not performed; or that it was void at common law *ab initio*^c, as being made by a married woman^d, lunatic^e, &c. or that it became void after it was made, and before the commencement of the action^f, by erasure, alteration, cancelling, &c.; or that a bail bond was taken *after* the return day of the writ, conditioned for the defendant's appearance *on* the return day^g: But the defendant could not have given in evidence, under the general issue of *non est factum* in *debt* on specialty, that the deed was voidable by infancy^h, duressⁱ, *per minas*^j, &c. or that it was void by act of parliament^k, as by the statutes of *usury*^l or *gaming*, or the *annuity* act^m, &c. So, where a party who had executed a bond, was at the time competent to execute it, he could not, under the plea of *non est factum*, shew that he was mis-

^a *Ante*, 356, 7.

^b 2 Rol. Abr. 683. pl. 8. *Twyford v. Bernard*, T. Raym. 197. *Bushell v. Pasmore*, 6 Mod. 217. *Stoytes v. Pearson*, 4 Esp. Rep. 255. *per* Ld. *Ellenborough*, Ch. J.

^c *Whelpdale's case*, 5 Co. 119; and see *Collins v. Blantern*, 2 Wils. 341. 347; but see *Harmer v. Wright*, (*or* *Rowe*), 2 Stark. Nl. Pri. 35. 6 Maule & S. 146. 2 Chit. R. 334. S. C.; and see 2 Stark. Nl. Pri. 36. *in notis*. *Wilson v. Woolfries*, 6 Maule & S. 341. *Edwards v. Brown*, 1 Crompt. & J. 307. 1 Tyr. Rep. 182. S. C. and the authorities there referred to.

^d *Lambert v. Atkins*, 2 Campb. 272. *per* Ld. *Ellenborough*, Ch. J.

^e *Yates v. Boen*, 2 Str. 1104; but see *Thompson v. Leach*, 2 Salk. 675; and see *Brown v. Jodrell*, 3 Car. & P. 30. 1 Moody & M. 105. S. C.

^f *Whelpdale's case*, 5 Co. 119. b.; *Manwood v. Harris*, Sav. 71. *semb. contra*.

^g *Thompson v. Rock*, 4 Maule & S. 338; and see *Samuel v. Evans*, 2 Durnf. & E. 569.

^h The contract of an infant seems in general to be *void*; though, in the case of a bond, &c. his infancy must be pleaded to avoid it. *Whelpdale's case*, 5 Co. 119. a. *Gilb. Debt*. 437. *Thompson v. Leach*, 2

Salk. 675. 1 Ld. Raym. 315. S. C.; but see *Darby v. Boucher*, 1 Salk. 279. where *Treby*, Ch. J. said, that a promise of an infant is absolutely void; but a bond takes effect by sealing and delivery, and consequently is a more deliberate act, and therefore is only voidable; and see *Zouch d. Abbot v. Parsons*, 3 Bur. 1794. 1805. *Lawes on Pleading*, 569. *Gibbs v. Merrill*, 3 Taunt. 307. *Baylis v. Dineley*, 3 Maule & S. 477. *Ingledew v. Douglas*, 2 Stark. Nl. Pri. 36. *Godfrey v. Wade*, 6 Moore, 488. *Belton v. Hodges*, 9 Bing. 365. *Gillow v. Lillie*, 1 Bing. N. R. 695. 1 Scott, 597. 1 Hodges, 160. S. C. See also the statute 9 Geo. IV. c. 14. § 5. by which "no action shall be maintained, whereby to charge any person, upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

ⁱ 2 Inst. 482, 3.

^j *Whelpdale's case*, 5 Co. 119. a.

^k Ld. *Bernard v. Saul*, 1 Str. 498.

^l *Mestayer v. Biggs*, 1 Crompt. M. & R. 110. 4 Tyr. Rep. 466. 2 Dowl. Rep. 695. S. C.

led as to the legal effect of the bond ^a: In these cases, therefore, the defendant must have pleaded specially ^b. And by a late statutory rule of pleading ^c, it is declared that "in *debt* on specialty, the plea of *non est factum* shall operate as a denial of the execution of the deed, in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable." In this action therefore, the defendant must still plead, as previously to the above rule, *payment* at or after the day, *performance* of the condition of the bond, or any matter in *excuse* of performance, as *non damnificatus* to a bond of indemnity, no *award* to an arbitration bond, or, to a bail bond, no process to arrest the defendant ^d, &c. but the *arrest* cannot be traversed ^e; and a plea to a declaration on a bail bond, that no *proper* affidavit of the debt was filed, is bad ^f. The defendant must also plead specially in *discharge* of the action, a tender, or set off.

By statutory rule, and decisions thereon.

In *debt* on simple contract, *nil debet* was formerly a good plea, or, in actions by executors or administrators, *non detinet*, in all cases where nothing was due to the plaintiff, at the time of commencing the action ^g; and under this plea, the defendant might not only have put the plaintiff upon shewing the existence of a legal contract, but he might have given in evidence the performance of it, or any matter in excuse of performance. He might also have given in evidence under this plea, a release, or other matter in *discharge* of the action ^h. And it was even holden, that as the plea was in the present tense, the statute of limitations might have been given in evidence under it ⁱ. But *nil habuit in tenementis* was no plea in an action of *debt* for use and occupation ^k: and in *debt* for rent, upon an indenture of lease, if the

What might formerly have been given in evidence on *nil debet*, or must have been specially pleaded, in *debt* on simple contract.

^a *Edwards v. Brown*, 1 Crompt. & J. 307. 1 Tyr. Rep. 182. S. C.; and see *Cranbrook v. Dadd*, 5 Car. & P. 402. *per Bolland*, B.

^b *Tidd Prac.* 9 Ed. 650. 1 Chit. Pl. 424.

^c *R. Pl. H. 4 W. IV. Covenant and Debt*, reg. II. § 1. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 21.

^d *Saxby v. Kirkus*, Say. Rep. 116; and see *Tidd Prac.* 9 Ed. 651. *White v. Ansdell*, 1 Meeson & W. 348. 1 Tyr. & G. 785. S. C.

^e *Watkins v. Parry*, 1 Str. 444. Fort. 364. S. C. *Taylor v. Clow*, 1 Barn. & Ad. 223. *Call v. Thelwell*, 3 Dowl. Rep.

443. 9 Leg. Obs. 396. S. C.

^f *Hume v. Liversidge*, 1 Crompt. & M. 332. 3 Tyr. Rep. 257. 1 Dowl. Rep. 660. S. C. *Knowles (or Snow) v. Stevens*, 1 Crompt. M. & R. 26. 2 Dowl. Rep. 664. 4 Tyr. Rep. 1016. S. C.

^g *Com. Dig. tit. Pleader*, 2 W. 17.

^h *Anon.* 5 Mod. 18. *Paramore (or Paramour) v. Johnson*, 1 Ld. Raym. 566. 12 Mod. 376. S. C.; but see *Gilb. C.P.* 63. *Gilb. Debt*, 434. 443. *semb. contra.*

ⁱ *Draper v. Glassop*, 1 Ld. Raym. 153. *Lee v. Clarke*, 2 East, 336. *per Laurence*, J.

^k *Curtis v. Spitty*, 1 Bing. N. R. 15. 4 Moore & S. 554. S. C.

defendant pleaded *nil debet*, he could not have given in evidence that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him^a. In this action also, as in *assumpsit*, a tender must have been specially pleaded^b.

When specialty was inducement to, or foundation of action.

When a specialty was but inducement to the action, and matter of fact the foundation of it, there *nil debet* was a good plea; as in *debt* for rent by indenture; for the plaintiff need not have set out the indenture^c. So, in *debt* for an escape^d, or on a *devastavit* against an *executor*^e, the judgment was but inducement, the escape and *devastavit* being the foundation of the action. But when the deed was the foundation, and the fact but inducement, there *nil debet* was no plea; as in *debt* for a penalty on articles of agreement^f, or on a bail bond^g, &c. In the latter action, however, if the defendant pleaded *nil debet*, and the plaintiff did not demur, but took issue thereon, it let the defendant into any defence he might have had on the merits^h. In *debt* for rent on a *parol* lease, the defendant was allowed to plead *non dimisit*ⁱ; but he could not plead this plea, in *debt* for rent on an indenture^k; and *riens en arriere* was said not to be a good plea, without concluding *et issint nil debet*^l.

Plea of *nil debet* abolished, by statutory rules.

The plea of *nil debet* was abolished, and another plea substituted in lieu thereof, by the late statutory rules of pleading^m; which declare that "the plea of *nil debet* shall not be allowed in any action;" and that "in actions of *debt* on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that he never was indebted, in manner and form as in the declaration alleged; and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*: and all matters in confession and avoidance

^a *Trevivan v. Lawrence*, 1 Salk. 277; and see *Partington v. Woodcock*, 1 Har. & W. 262. *Tidd Prac.* 9. Ed. 649.

^b *Tidd Prac.* 9 Ed. 648, 9. 1 Chit. PL 422.

^c *Gilb. C. P.* 61, 2. *Wilson v. —*, Hardr. 332. *Warren v. Consett*, 2 Ld. Raym. 1501, 2, 3. *Atty v. Parish*, 1 New Rep. C. P. 105. 109. *Jones v. Pope*, 1 Wms. Saund. 5 Ed. 38. (3.) *Dean & Chapter of Windsor v. Gover*, 2 Wms. Saund. 297. (1.)

^d *Waites v. Briggs*, 2 Salk. 565.

^e *Wheatley v. Lane*, 1 Wms. Saund. 5 Ed. 219. *Aby v. Buxton*, Garth. 2.

^f *Warren v. Consett*, 2 Ld. Raym.

1500. 2 Str. 778. 1 Barnard. K. B. 15. 8 Mod. 106. 323. 382. S. C.

^g *Id. Mills v. Bond*, Fort. 363. *Mayhew v. Mayhew*, *id.* 367. *Hart v. Weston*, 5 Bur. 2586.

^h *Rawlins v. Danvers*, 5 Esp. Rep. 38. *per Ld. Ellenborough*, Ch. J.; and see *Tidd Prac.* 9 Ed. 649, 50.

ⁱ *Gilb. Debt*, 438.

^k *Id.* 436.

^l *Id.* 440. cites *Bro. Dette*, 118. *Anon. Keilw.* 153.

^m *R. Pl. H.* 4 W. IV. *Covenant and Debt*, reg. II. § 2, 3. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 22. *Anle*, 338.

shall be pleaded specially, as therein directed in actions of *assumpsit*." In other actions of *debt*, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, it is declared by another statutory rule^a, that "the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance."

The form of plea to an action of *debt*, prescribed by the above rules, must be adhered to in terms: and therefore, a plea that the defendant "never did *owe*," was holden to be bad on special demurrer; the form being that he "never was *indebted*."^b In an action of *debt* for goods sold and delivered, if the defence be that the goods were sold on a credit which had not expired at the time of bringing the action, this, it has been holden in the King's Bench, must be specially pleaded^c: but from subsequent decisions it seems, that this ground of defence may be given in evidence on the plea of *nunquam indebtedatus*^d. And in an action of *debt*, a plea that parcel of the money claimed was the residue of a sum agreed to be paid for a boat, warranted sound and fit for use, but which was afterwards found to be of no greater value than the amount paid at the time of sale, was holden to be bad on demurrer, as amounting to the general issue^e. In an action of *debt* for work and labour, on an implied contract, the defendant, on the plea that he never was indebted, may go into evidence to prove that the work was done under such circumstances as shew that there was no implied contract to pay any thing^f; but upon this plea, the defendant cannot go into evidence of misconduct, except such as goes to shew that there was no implied contract to pay^g. And in an action of *debt*, brought by two of three Syndics of a French bankrupt, it was doubted, whether the objection to the non-joinder of the third Syndic, if available, could be taken on the plea of *nil debet*^h.

Decisions there-
on.

In action of
debt, for goods
sold and de-
livered.

Work and la-
bour.

^a R. Pl. H. 4 W. IV. *Covenant and Debt*, reg. II. § 4. 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 22.

^b Smedley v. Joyce, 1 Tyr. & G. 84. 2 Crompt. M. & R. 721. 1 Gale, 357. 4 Dowl. Rep. 421. 11 Leg. Obs. 484. S. C.

^c Edmunds v. Harris, 6 Car. & P. 547. 4 Nev. & M. 182. 2 Ad. & E. 414. S. C. 1 Chit. Jun. Pl. 204. 291. 378, 9; and see Rosc. Law Tracts, 21, 2.

^d Taylor v. Hillary, 1 Crompt. M. & R. 741. 5 Tyr. Rep. 378. 3 Dowl. Rep. 461. 1 Gale, 23. 9 Leg. Obs. 494. S. C. per Parke, B. Knapp v. Harden, 1 Gale, 47. Cousins v. Paddon, 2 Crompt. M. & R.

553. 5 Tyr. Rep. 535. 4 Dowl. Rep. 488. S. C. Jones v. Nanney, 1 Meeson & W. 336. 1 Tyr. & G. 638. 5 Dowl. Rep. 90. S. C. per Parke, B.; and see Rosc. Law Tracts, 21, 2. *Ante*, 345.

^e Dicken v. Neale, 5 Dowl. Rep. 176. 1 Meeson & W. 556. S. C.

^f Cooper v. Whitehouse, 6 Car. & P. 545. per Alderson, R.; and see Cousins v. Paddon, 2 Crompt. M. & R. 553. 5 Tyr. Rep. 535. 4 Dowl. Rep. 488. S. C. *Ante*, 344, 5. 346.

^g Alivon v. Furnival, 1 Crompt. M. & R. 277. 4 Tyr. Rep. 751. S. C.

Pleas in actions, to which statutory rules do not apply.

It has been already observed ^a, that the late statutory rules of pleading do not contain any particular directions as to the mode of pleading in the actions of *account*, *annuity*, *debt* or *scire facias* on matters of record, as judgments or recognizances, or *debt* on penal statutes; though these actions are subject to the general rules and regulations applicable to all pleadings: and therefore, it may not be improper, in this place, to take a view of the pleas in these actions.

In account.

In an action of *account*, there is no general issue ^b; and the pleas are in *bar* of the action, or *before auditors*. The defendant may plead in *bar* of the action, that he never was *guardian*^c, *bailiff*^d, or *receiver*^e, or his *infancy*^f, or that he hath fully accounted to the plaintiff^g, or before auditors^h; or, if he be charged as *receiver*, that the plaintiff gave him the money^b, or assigned it for satisfaction of his debt^b, or that it was delivered to him for a particular purpose which he has performed^b; or he may plead, in his *discharge*, a *release* from the plaintiff of all actionsⁱ, an arbitrament^k, or the statute of limitations^l. But, generally speaking, a plea in *account* is not good, which admits the defendant to have been once chargeable, though it goes in *discharge*, for that shall be pleaded before auditors^m, as a gift after receipt without deed^m, &c.: and money could not, it seems, be paid into court in this actionⁿ. The defendant may plead in *account* before *auditors*, that he has paid the money to the plaintiff, or his order^o, or expended it for his maintenance^o, or accounted for it to the plaintiff himself^o. So, it is a good plea before auditors, that the defendant lost the thing by inevitable accident^p, or that he was robbed of it without his default^p; or that the goods, in a tempest, were cast into the sea, for preservation of the ship^p; or that the ship was seized by the king's enemies, and he paid so much for the redemption of it^q; or that he put them into a warehouse, from whence they were taken by an enemy^r. But the defendant is not allowed to plead before auditors,

^a *Ante*, 337.

^b 1 Chit. *Pl.* 429.

^c Com. Dig. tit. *Accompt*, E. 3. Rast. 21.

^d Com. Dig. tit. *Accompt*, E. 4. Co. Ent. 46. 3 Chit. *Pl.* 1298, 9.

^e Com. Dig. tit. *Accompt*, E. 5. Rast. 19. Lutw. 47. 1 Mod. Ent. 51. 1 Morg. Mod. *Pl.* 49.

^f 1 Rol. Abr. 122. *L.* 50.

^g Com. Dig. tit. *Accompt*, E. 4, 5. Rast. 17. 20. Lutw. 58. 3 Chit. *Pl.* 1299, 1300.

^h Com. Dig. tit. *Accompt*, E. 5.

ⁱ 1 Rol. Abr. 123. 1 Sel. *Ni. Pri.* 5 Ed. 4.

^k Com. Dig. tit. *Accompt*, E. 5. Taylor v. Page, Cro. Car. 116. Lutw. 52.

^l Vid. Ent. 76. 3 Wils. 74.

^m Com. Dig. tit. *Accompt*, E. 6; and see Bac. Abr. tit. *Account*, E. Godfrey v. Saunders, 3 Wils. 73. 94.

ⁿ Bul. *Ni. Pri.* 128; and see 1 Chit. *Pl.* 429, 30. 1 Sel. *Ni. Pri.* 5 Ed. 4, 5.

^o Com. Dig. tit. *Pleader*, F. 11. Lutw. 50.

^p Co. Lit. 89.

^q 1 Rol. Abr. 124.

^r Goswill v. Dunkley, 2 Str. 680.

a matter which goes in bar of the account ^a, though he omitted to plead it in bar ^a; or any thing contrary to what was pleaded in bar, and found by verdict ^a.

To a declaration in *annuity*, the defendant may plead *riens en arriere* ^b, In annuity. or *non concessit* ^c; or, if the declaration be founded upon a prescription, he may traverse the prescription, or deny it directly ^d: but it is no plea that nothing passed by the deed, for perhaps the annuity was not in *esse* before ^e. So, the defendant may plead a release of all *personal* actions in bar of an *annuity* ^f, or that the rent was levied by distress ^g, or that the defendant enfeoffed the plaintiff of the land charged with the rent ^h, &c.

In *debt* or *scire facias* on a judgment or recognizance, the general issue is *nul tiel record* ⁱ; which may be properly pleaded, where there is either no record at all, or one different from that which the plaintiff has declared on ^k. But as this plea only goes to the existence of the record, the defendant must plead payment, or any matter in discharge of the action: and if an action of *debt* be brought here, on a judgment in *Ireland*, the plea of *nul tiel record* must conclude to the country ^l. It should also be observed, that a defendant cannot plead any matter to a *scire facias* upon a judgment, which he might have pleaded to the original action ^m: and therefore where, to a *scire facias* on a judgment, the defendant pleaded the *bankruptcy* of the plaintiff, but it did not distinctly and affirmatively appear that the bankruptcy had occurred after the judgment in the original action, the plea was holden to be bad, on special demurrer ⁿ.

In an action of *debt* on a *penal* statute, the plea of *nil debet* having been abolished ^o, there is no longer any general issue, or plea in denial of the whole cause of action, unless it should be held that the

^a Com. Dig. tit. *Accompt*, F. 11. Bac. Abr. tit. *Account*, F. Godfrey v. Saunders, 3 Wils. 73. 94.

^b Winch. Ent. 10.

^c Id. 11.

^d Co. Ent. 49. a.

^e Steward's case, 2 Leon. 13.

^f Co. Lit. 285. Bodvell v. Bodvell, W. Jon. 214.

^g Co. Ent. 49. b.

^h Com. Dig. tit. *Annuity*, F.

ⁱ Ante, 323.

^k Gilb. *Debt*, 444. Marsh v. Cutler, 3 Mod. 41.

^l Collins v. Ld. Mathew, 5 East, 473.

^m 2 Smith R. 25. S. C.; and see Glynn v. Thorpe, 1 Barn. & Ald. 153. Parkins v. Stewart, 9 Price, 3. Dyson v. Wood, 3 Barn. & C: 449. 5 Dowl. & R. 295. S. C. Harris v. Saunders, 4 Barn. & C. 411. 6 Dowl. & R. 471. S. C. Guinness v. Carroll, 1 Barn. & Ad. 459. 461. Tidd *Prac.* 9 Ed. 651. 1 Chit. *Pl.* 426.

ⁿ Baylls v. Hayward, 5 Nev. & M. 613. 1 Har. & W. 609. S. C.; and *querre*, whether it would be good on general demurrer? *Id. ib.* and see Tidd *Prac.* 9 Ed. 1130.

^o Ante, 360.

plea of *not guilty* is a good plea in such an action, which rather seems to be the case^a. In *debt qui tam*, the defendant was not formerly allowed to give in evidence, on the plea of *nil debet*, a recovery against him by another person for the same forfeiture; for if it had been pleaded, the plaintiff would have been at liberty to reply *nul tiel record*, or that it was a recovery by fraud to defeat a real prosecutor, which he might not be prepared to shew upon *nil debet*^b.

What may be given in evidence by defendant on general issue, or must be specially pleaded, in actions for wrongs. In *detinue*.

It will next be proper to consider what might have been formerly, and may now be given in evidence by the defendant, on the general issue or common plea in denial, or must be specially pleaded, in actions for wrongs. These actions are *detinue*, *case*, *replevin*, and *trespass vi et armis*.

By statutory rule, and decisions thereon.

In *detinue*, the defendant might formerly have given in evidence, under the general issue of *non detinet*, his property in the goods, or a gift of them from the plaintiff; for that proved he detained not the plaintiff's goods^c: But now, by a late statutory rule of pleading^d, "the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial, shall be admissible under that plea." In this action, therefore, the defendant must, under the above rule, specially deny the plaintiff's property in the goods, when necessary for his defence; or he may plead a gift of them from the plaintiff, or some other matter of fact to prove that the defendant is entitled to the possession of them; as that they were pawned to him for money which still remains unpaid^e, or that he has a lien thereon^f; or, if the action be founded upon a *bailment*, that they were delivered over to the person for whose use they were bailed^g. In an action of *detinue* against an attorney, for not delivering up papers to his client after his bill has been paid, if the defendant plead *non detinet*, the plaintiff must prove that the papers were in the defendant's possession; but evidence that they were produced by his agent before the master, on the taxation of his bill, is sufficient proof of his possession^h. And as

^a *Coppin v. Carter*, 1 Durnf. & E. 492; and see Com. Dig. tit. *Pleader*, 2 S. 11. 17. Bac. Abr. tit. *Pleas and Pleading*, J. 1 Chit. PL 5 Ed. 428. 522. Tidd Prac. 9 Ed. 649.

^b *Bredon v. Harman*, 1 Str. 701, 2. per *Eyre*, Ch. J.

^c Co. Lit. 283; and see *ante*, 338.

^d R. / L. H. 4 W. IV. *Detinue*, reg. III. 5 Barn. & Ad. Append. ix. 10 Bing.

470. 2 Crompt. & M. 22.

^e Co. Lit. 283.

^f *Alexander v. McGowan*, Sit. after M. T. 3 Geo. IV. per *Abbott*, Ch. J.

^g Com. Dig. tit. *Pleader*, 2 X. 6; and see 1 Chit. PL 114. 430. Tidd Prac. 9 Ed. 652. *Ante*, 329.

^h *Anderson v. Passman*, 7 Car. & P. 193.

the gist of the action of *detinue* is the *detainer*, the bailment in the declaration is in general immaterial: therefore, the defendant may set up in his plea, a bailment different from that stated in the declaration; and the plaintiff, without traversing it, may shew that the detainer is wrongful notwithstanding, without being guilty of a departure^a.

In actions on the *case*, the defendant, upon the plea of not guilty, In case. might formerly not only have put the plaintiff upon proof of the whole charge contained in the declaration, but might have offered any matter in excuse or justification of it^b; or he might have set up a former recovery, release, or satisfaction^c: For an action on the *case* was considered as founded upon the mere justice and conscience of the plaintiff's case, and in the nature of a bill in equity, and in effect was so; and therefore such a former recovery, release, or satisfaction, need not have been pleaded, but might have been given in evidence under the general issue; since whatever would in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, might in this action have been given in evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his case, and upon that only^d: But by By statutory rule. a late statutory rule of pleading^e, it is declared that "in actions on the *case*, the plea of *not guilty* shall operate as a denial only of the breach of duty, or wrongful act, alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration, and all matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*." ^f

In an action on the *case* for an injury to real property *corporeal*, by For nuisances, or obstructing rights of way, &c. *nuisances* to houses, lands, water-courses, &c. to the prejudice of the plaintiff's possession or reversion, or to real property *incorporeal*, by obstructing rights of *way*, &c. it was formerly incumbent on the plaintiff to prove, on the general issue, all the facts stated in the inducement to the declaration, as well as the wrongful act complained of, and the consequential damages arising therefrom; and the defendant

^a *Gledstane (or Gledstone) v. Hewitt*, 1 Tyr. Rep. 445. 1 Crompt. & J. 565.
1 Price, N. R. 71. S. C.

^b *Regina v. Tutchin*, 2 Mod. 276, 7. *Newton v. Creswick*, 3 Mod. 166. Anon. Com. Rep. 273. *Barber v. Dixon*, 1 Wils. 44. *Brown v. Best*, *id.* 175.

^c *Bird v. Randall*, 3 Bur. 1353. 1 Blac.

Rep. 388. S. C.

^d *Id. ib.* Tidd Prac. 9 Ed. 651. 1 Chit. Pl. 432.

^e R. Pl. H. 4 W. IV. Case, reg. IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 470, 71. 2 Crompt. & M. 22, 3.

^f *Id.* § 2. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

By statutory
rule.

Decisions there-
on.

was allowed to give the whole of his case in evidence under the general issue. But, by a late statutory rule of pleading ^a it is declared that "in an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house; and in an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way." In an action for a nuisance however, where the defendant pleads not guilty, the plaintiff must still, notwithstanding the above rule, not only prove the existence of the nuisance, but that the defendant was the person who caused it ^b. But since the above rule, the plea of not guilty to a declaration in case, for the wrongful diversion of water from the plaintiff's mill, puts in issue the mere fact of the diversion, and not its wrongful character ^c: Therefore, where the fact of the diversion was proved, but the plaintiff failed to shew his right to the water, the court ordered the verdict, which had been entered for the defendant on the issue of not guilty, to be set aside, and a verdict to be entered for the plaintiff, but without damages ^c. And, in an action on the case for a nuisance to the plaintiff's property, by digging a trench in an adjoining close, the defendant cannot now, under the plea of not guilty, raise any objection as to defective proof of the inducement in the declaration ^d. To an action on the case for a nuisance in making a noise, &c. near plaintiff's dwelling house, which he was possessed of for a term of years, the defendants pleaded that they had been possessed of certain workshops in which the noise was made, ten years before the plaintiff was possessed of the term in his house, and that they had always during that time made the noise in question, which was necessary for carrying on the trade; and the plea was holden to be bad ^e. And, in an action on the case by a lodger, for removing a water closet, &c. if the defendant merely plead the general issue, he cannot give in evidence that the water closet was useless before he removed it; but, in mitigation of damages, he may go into evidence to shew that the plaintiff and his family were bad lodgers, and that he did the acts complained of

^a R. Pl. H. 4 W. IV. Case, reg. IV.
§ 1. 5 Barn. & Ad. Append. ix. 10 Bing.
471. 2 Crompt. & M. 22.

^b Dawson v. Moore, 7 Car. & P. 25.

^c Frankum v. Earl of Falmouth, 4 Nev.
& M. 330. 2 Ad. & E. 452. 1 Har. &

W. 1. 6 Car. & P. 529. S. C.; and see
5 Nev. & M. 268. (a.)

^d Dukes v. Gostling, 3 Dowl. Rep. 619.

1 Scott, 570. 1 Hodges, 120. S. C.

^e Elliotson v. Feetham, 2 Bing. N. R.

134. 2 Scott, 174. 1 Hodges, 259. S. C.

to cause them to quit the house^a. Where the defendant claims^a a right of *common*, or of *way*, &c. he must set forth in his plea a strict legal right thereto^b.

In *trover*, it was formerly necessary for the plaintiff to prove, on the general issue of not guilty, his property in the goods for the conversion of which the action was brought, and their value, and that the defendant actually converted them to his own use, or, having them in his possession, refused to deliver them to the plaintiff on demand, which was evidence of a conversion. In this action, it was commonly said, there could be no special plea, except a release; but this was a mistake: for the defendant might have pleaded specially any thing else which, admitting the plaintiff had once a cause of action, went to *discharge* it, as the statute of limitations^c, or a former recovery^d, &c. The *bankruptcy* of the *plaintiff*, before the cause of action accrued, might have been given in evidence in this action, under the plea of not guilty^e; but where the bankruptcy happened after the cause of action accrued, it should it seems have been pleaded specially: But now, by a late statutory rule of pleading^f, it is declared, that "in an action for converting the plaintiff's goods, the plea of not guilty will operate as a denial of the conversion only, and not the plaintiff's title to the goods." The intention of this rule was to confine the operation of the plea of not guilty to a denial of the *fact* of conversion only, and not to allow the defendant to give evidence of its *legality*, any more than on a plea of not guilty to an action on the *case* for obstructing a right of way, the defendant could be allowed to shew that the obstruction was lawful, or, under the like plea to an action for diverting a watercourse, to give evidence that such diversion was justifiable, by licence or prescription^g.

If the defendant mean to deny the plaintiff's *title* to the goods, he should plead that the plaintiff was not *possessed* of them as of his

In *trover*.

By statutory rule.

Decisions thereon.

^a Underwood v. Burrows, 7 Car. & P. 26.

^b Ryder v. Smith, 3 Durnf. & E. 766. Grimstead v. Marlowe, 4 Durnf. & E. 717. 719.

^c Cowper v. Towers, 1 Lutw. 99. Pratt v. Swaine, 8 Barn. & C. 285. 2 Man. & R. 350. S. C.

^d Lechmore v. Toplady, 1 Show. 148.

^e Webb v. Fox, 7 Durnf. & E. 391; and see Tidd *Prac.* 9 Ed. 651. 1 Chit. *Pl.* 436. Worswick v. Beswick, 10 Barn. & C. 676. Joll v. Fisher, 5 Car. &

P. 514. *per Tindal*, Ch. J.; but see Alston v. Underhill, 1 Crompt. & M. 492. 3 Tyr. Rep. 427. 2 Dowl. Rep. 26. S. C.

^f R. *PL. H.* 4 W. IV. *Case*, reg. IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

^g Stancliffe v. Hardwick, 2 Crompt. M. & R. 1. 5 Tyr. Rep. 551. 1 Gale, 127. 3 Dowl. Rep. 762. S. C. *per Parke*, B.; and see Farrar v. Beswick, 1 Meeson & W. 682. *Ante*, 366.

own property, or as of his own proper goods and chattels, as alleged in the declaration: and, under this plea, it will be incumbent on the plaintiff to prove his title to the goods; and the defendant may give in evidence any matter tending to disprove it. But it seems, that a plea that the goods are not, nor were the property of the plaintiff, as alleged in the declaration, and concluding to the country, where the declaration alleges that the plaintiff was *possessed* of the goods as of his own property, is an informal plea, and would be bad on special demurrer^a. And where the plaintiff in *trover* claims under a sale, the defendant, on a plea that the plaintiff was not possessed of the goods as of his own property, cannot shew the sale to have been fraudulent^b: the fraud must be pleaded^b. In *trover* for a bill of exchange, the defendant pleaded that before the conversion, *A.* was lawfully possessed of the bill, and that he indorsed it to *B.*, who indorsed it for a valuable consideration to the defendant; the replication took issue upon the averment of consideration, which was found for the plaintiff; and the court held, that by this plea the title of the plaintiff was admitted, and that the defendant was not entitled to arrest the judgment, upon the ground that the title appeared to be in *A.*^c: They also held, that the defendant was not entitled to a repleader^c. Where the defendant pleaded that the goods in dispute were his own property, and that he delivered them to *R. R.* who delivered them to the plaintiff, whereupon the defendant took them from the plaintiff, which was the conversion complained of, the plea was holden to be good, on special demurrer^d. And where the declaration in *trover* stated that the plaintiff was possessed, as of his own property, of certain cattle, to wit, four horses, which the defendant converted and disposed of to his own use, and the defendant pleaded first, that they were not the property of the plaintiff; secondly, a judgment recovered against *J. F.* and that the defendant (a sheriff's officer) seized them under an execution against the said *J. F.* the same being the goods and chattels of the said *J. F.* and liable to be seized and taken as aforesaid, and not being the property of the plaintiff; to which the plaintiff replied that they were the cattle and property of the plaintiff, *modo et forma*; and at the trial, it was found by the jury that they were the property of the plaintiff and *J. F.* jointly; the court held, that the issue raised by the defendant was whether the

^a Samuel v. Morris, 6 Car. & P. 620.
per Parks, B.; and see Howell v. White,
1 Moody & R. 400.

^b Howell v. White, 1 Moody & R.
400. per Patteson, J.

^c Fancourt v. Bull, 1 Hodges, 98. 1
Bing. N.R. 681. 1 Scott, 645. S. C.

^d Morant v. Sign, 2 Meeson & W. 95.
5 Dowl. Rep. 319. 13 Leg. Obs. 158. S. C.

cattle were the sole property of *J. F.*; and the jury having found that they were the joint property of the plaintiff and *J. F.*, that the plaintiff was entitled to recover ^a. To a declaration in *trover*, by the assignees of a bankrupt, for a policy of insurance, the defendant, after stating the existence of mutual accounts between him and the bankrupt, pleaded a lien, by the *custom of London*, for a general balance due to him as an insurance broker; to which the plaintiffs replied a bill of exchange given and taken as payment for this balance, and not due at the time of the conversion in question; and the court, upon demurrer, held that the defendant could not, without pleading it as a defence, rely also on the ground of a *mutual credit* between the parties, to justify his detention of the policy ^b.

By assignees of bankrupt.

The conversion, which is put in issue by the plea of not guilty since the new rules, is a conversion in *fact*, and not merely a wrongful conversion ^c: And wherever there has been a conversion in fact, and the defendant insists that such conversion was lawful, he must confess and avoid it, by pleading specially the right or title by virtue of which he was justified in the conversion ^d. But where there has been no actual conversion of the goods, but merely a refusal to deliver them on demand, a defendant who pleads not guilty in an action of *trover*, admits thereby only that the plaintiff has *some* property in the goods, in respect of which he would be entitled to recover against the defendant; and such admission does not preclude the defendant from shewing that he is tenant in common with the plaintiff ^e, or is otherwise entitled to retain the possession of the goods: And where the defendant in such case has a lien thereon, a doubt has been entertained as to the necessity of his pleading it, specially; though as the lien may be considered as matter of title, the safer way seems to be to plead it specially, as in the action of *detinue* ^f.

When there has been an actual conversion.

When not.

It has been already seen ^g, that in an action of *slander*, whether verbal or written, it is incumbent on the plaintiff to prove, on the plea of not guilty, the speaking of the words, or publication of the libel, complained of; and that they were spoken or published maliciously,

In action of slander, what must be proved by plaintiff.

^a *Farrar v. Beswick*, 1 Meeson & W. 682.

^b *Hewison v. Guthrie*, 2 Bing. N. R. 755. 3 Scott, 298. S. C.

^c *Ante*, 367.

^d *Stanciliffe v. Hardwick*, 2 Crompt. M. & R. 1. 5 Tyr. Rep. 551. 1 Gale, 127.

3 Dowl. Rep. 762. S. C. *per Parke*, B.; and see *Farrar v. Beswick*, 1 Meeson & W. 682.

Vernon v. Shipton, 2 Meeson & W. 9.

^e *Ante*, 329, 364; and see *Townley v. Crump*, 4 Ad. & E. 58. *Rosc. Law Tracts*, 68, 4.

^f *Ante*, 338.

What may be given in evidence by defendant, on general issue.

and in the sense imputed by the declaration^a: And where the ground of defence is, that they were spoken or published, not in the malicious sense imputed, but in an innocent sense, or upon an occasion which warranted the speaking or publication, this may be given in evidence by the defendant, under the plea of not guilty; as if the words be spoken by a member of parliament in the House of Lords^b, or Commons^c; or in the course of a legal proceeding^d, either by the party or a witness, or by counsel, or a judge^d; or for the purpose of obtaining redress, or forwarding the ends of justice^d; or were spoken or written in confidence, by way of advice^e; or *bond fide*, with a view of investigating a fact in which the party is interested^f; or were a fair criticism on the plaintiff's work^g. But communications made by one member of a charitable association to another, reflecting on the conduct of the medical attendant of the establishment, are not privileged^h. And, in an action of slander, the plea of privileged communication must allege that the defendant made the communication on a lawful occasion, believing it to be true, and without malice; or at least *bond fide*ⁱ. And when words are given in evidence by the plaintiff, in order to prove malice, which are not stated in the declaration, the defendant may prove the truth of such words^k. Where the occasion of communicating an alleged libel rebuts the *prima facie* presumption of malice, the plaintiff must shew there was malice in fact; which may be shewn not only by extrinsic evidence, but may be inferred from the language of the communication itself^l. But in an action of slander, the existence of express malice is only a matter

^a For the evidence which the plaintiff is allowed to give, in an action of slander, to shew the malice of the defendant, and increase the damages, see *Macleod v. Wakley*, 3 Car. & P. 311. *Jackson v. Adams*, 1 Hodges, 78. *Defries v. Davis*, 7 Car. & P. 112. *Vines v. Serell*, *id.* 163. *Rosc. Evid.* 2 Ed. 293, 4; but see *Stuart v. Lovell*, 2 Stark. *Ni. Pri.* 93. *Tidd Prac.* 9 Ed. 652.

^b *Rex v. Lord Abingdon*, 1 Esp. Rep. 226.

^c *Rex v. Creery*, 1 Maule & S. 273; but this privilege does not extend to a subsequent publication, *id. ib.* *Rex v. Lord Abingdon*, 1 Esp. Rep. 226.

^d *Lake v. King*, 1 Saund. 181. *Fairman v. Ives*, 5 Barn. & Ald. 642; and see *Rosc. Evid.* 2 Ed. 295.

^e *Lillie v. Price*, 1 Nev. & P. 16. 13

Leg. Obs. 188, 9. S. C.; and see *Martin v. Strong*, 1 Nev. & P. 29. 13 *Leg. Obs.* 155, 6. S. C. *Rosc. Evid.* 2 Ed. 296, 7.

^f *Id.* 297; and see *Bromage v. Prosser*, 1 Car. & P. 475. *per Park, J.* Same *v.* Same, *id.* 673. *per Bayley, B.* *Hooper v. Truscott*, 2 Scott, 672. *Wright v. Woodgate*, 1 Gale, 329.

^g *Rosc. Evid.* 2 Ed. 297; and see 1 *Chit. Pl.* 433, 4.

^h *Martin v. Strong*, 1 Nev. & P. 29. 13 *Leg. Obs.* 155, 6. S. C.

ⁱ *Smith v. Thomas*, 2 Bing. N. R. 372. 2 Scott, 546. 4 *Dowl. Rep.* 333. 1 *Hodges*, 353. 11 *Leg. Obs.* 274. S. C.

^k *Warne v. Chadwell*, 2 Stark. *Ni. Pri.* 457. *per Abbott, Ch. J.*; and see *Underwood v. Parks*, 2 Str. 3 Ed. 1200. (1.)

^l *Wright v. Woodgate*, 1 Gale, 329.

for inquiry, where the words complained of were spoken upon a justifiable occasion ^a.

It is a general rule, that in an action of slander, the truth of the defamatory matter cannot be given in evidence under the plea of not guilty, even in mitigation of damages, but must be pleaded specially ^b, in order that the plaintiff may come prepared to defend himself, as well as to prove the speaking of the words, or the publication of the libel complained of; and this rule extends to all cases, whether the words or libel do or do not import a charge of felony ^b. It is also declared, by a late statutory rule of pleading ^c, that "in an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged."

What must be pleaded specially.

By statutory rule.

This rule appears to leave to the plea of not guilty in an action of slander, nearly the same effect that it possessed before, with the exception that, under the new rule, it is an admission of the inducement. In other respects, a justification must still be pleaded, in cases in which it was formerly necessary to plead it; and the defendant may still, under the plea of not guilty, give the like evidence as formerly, to shew that the words were not spoken in malice ^d. In short, not only the sense and application of the words, as that they related to the plaintiff, but also the malicious sense, as that they were spoken in a defamatory spirit, may still be controverted under the general issue. But any facts stated as matter of inducement, and necessary to be proved in order to render words actionable, as being spoken with reference to those facts, must now be directly denied, and will not be put in issue by the general plea of not guilty ^e.

Observations thereon.

In an action for slander of *title*, the truth of the words, or libel complained of, may be given in evidence under the plea of not guilty, to disprove malice ^f: And though, in an action for slander of the *person*,

In action for slander of title.

Of the person.

^a Hooper v. Truacott, 2 Scott, 672.

^d Rosc. Law Tracts, 49, 50.

^b Smith v. Richardson, Willes, 20. Barnes, 195. Com. Rep. 551. Pr. Reg. 383. S. C. Underwood v. Parks, 2 Str. 1200.

^e *Id. ib.*

^c R. Pl. H. 4 W. IV. Case, reg. IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

^f Watson v. Reynolds, 1 Moody & M. 1; and see Smith v. Spooner, 3 Taunt. 246. Robertson v. Macdougall, 3 Car. & P. 259. 1 Moore & P. 692. 4 Bing. 670. S. C. Malachi v. Soper, 3 Bing. N. R. 371. 13 Leg. Obs. 124. S. C.

What may be given in evidence by defendant, on general issue, in mitigation of damages.

the defendant is not allowed to give in evidence the truth of the defamatory matter, without a special plea of justification, yet he may prove on the plea of not guilty, in mitigation of damages, such facts and circumstances as shew a ground of suspicion, not amounting to actual proof of the guilt of the plaintiff^a: and in an action for a libel, he may give in evidence on the plea of not guilty, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime imputed to him; and that, on account of the suspicion, his relations and acquaintance had ceased to associate with him^b. The defendant may also give in evidence on such plea, not only that there were rumours and reports of the same tenor as in the supposed libel, previously current, but that the substance of the libellous matters had been published in a newspaper; and he is not required to lay a basis for this evidence, by producing the newspaper at the trial^c. And though the publication of preliminary or *ex parte* proceedings, containing defamatory matter, is not justifiable^d, yet in an action for a libel, purporting to be a report of a coroner's inquest, evidence of the correctness of the report is admissible, under the plea of not guilty, in mitigation of damages^e; but no evidence of the truth or falsehood of the facts stated at the inquest is admissible on either side^e. So, in an action for a libel, a defendant may give in evidence on the plea of not guilty, in mitigation of damages, other libels published of him by the plaintiff, relating to the same subject^f; but, in order to the admission of such libels in evidence, it must be distinctly shewn that they relate to the subject of the libel complained of^g. So, in an

^a Peake's Evid. 5 Ed. 308; and see

—— v. Moor, 1 Maule & S. 284.

Wyatt v. Gore, Holt Nl. Pri. 306, 7.

Sims v. Kinder, 1 Car. & P. 279. *per* Best, Ch. J. Jones v. Stevens, 11 Price, 235.

^b Earl of Leicester v. Walter, 2 Campb. 251. *per* Sir J. Mansfield, Ch. J.

^c Wyatt v. Gore, Holt Nl. Pri. 299.

per Gibbs, Ch. J.; but see Finnerty v. Tipper, 2 Campb. 72. 76. *per* Sir J. Mansfield, Ch. J. Waithman v. Weaver, Dowl. & R. Nl. Pri. 10. *per* Abbott, Ch. J.

^f Rex v. Lee, 5 Esp. Rep. 123. Rex v. Fisher, 2 Campb. 563. Rex v. Flint, 1 Barn. & Ald. 379. Duncan v. Thwaites, 3 Barn. & C. 556. 553. Rosc. Evid. 2 Ed. 297.

^g East v. Chapman, 1 Moody & M. 46.

2 Car. & P. 570. S. C.; and see Rex v.

Bradley, 2 Man. & R. 152. Robertson v.

Macdougall, 1 Moore & P. 692. 4 Bing.

670. S. C. Pattison v. Jones, 3 Car. &

P. 383. Dance v. Robson, 1 Moody &

M. 294. Finden v. Westlake, *id.* 461.

Charlton v. Watton, 6 Car. & P. 395. *per*

Patterson, J. Rosc. Evid. 2 Ed. 297.

^h May v. Brown, 3 Barn. & C. 113. 4

Dowl. & R. 670. S. C. Tarpley v. Blabey, 2

Bing. N. R. 437. 2 Scott, 642. 1 Hodges,

414. 7 Car. & P. 395. S. C.; and see

Finnerty v. Tipper, 2 Campb. 77. Wakley

v. Johnson, Ry. & Mo. 422. Moscati v.

Lawson, 7 Car. & P. 38. Watts v.

Fraser, *id.* 369. *per* Ld. Denman,

Ch. J.

action for a libel in a newspaper, the defendant was allowed, under the plea of not guilty, to shew in mitigation of damages, that he copied the statement from another newspaper^a; but was not allowed to shew that it had appeared concurrently in several other newspapers^a. So, the defendant in such an action cannot go into evidence, in mitigation of damages, to shew that the same libel had appeared in another newspaper, from which the plaintiff had already recovered damages; but the defendant may shew that he copied the libel from another newspaper, and omitted several passages contained in that newspaper, which reflected on the character of the plaintiff^b. And the defendant cannot, under the plea of not guilty, give evidence of any fact, in mitigation of damages, which would be evidence to prove a justification of any part of the libel^c.

It was formerly holden to be a good defence to an action for words, that the defendant was only the repeater of the words, and that he named the author of them at the time, and stated that he had heard them uttered^d; but such defence must have been specially pleaded^e. And it was not competent for the defendant, under the plea of not guilty, to offer, in mitigation of damages, evidence that the specific facts in which the slander consisted, and for which the action was brought, were communicated to him by a third person^f. The words actually uttered by the third person, and not merely the substance of them, must also have been proved, so as to furnish the plaintiff with a cause of action against such third person^g; and it must have been shewn that the defendant believed the words to be true, and that he spoke them on a justifiable occasion^h. In a late case, however, it was holden, that in an action for the publication of a libel, reflecting on the character of an individual, the defendant could not justify the publication, by pleading that the libellous matter was communicated to him by a third person, whose name he disclosed at the time of pub-

For repeating words spoken by another.

^a *Saunders v. Mills*, 6 Bing. 213. 3 Moore & P. 520. S. C.

^b *Creery v. Carr*, 7 Car. & P. 64.

^c *Vessey v. Pike*, 3 Car. & P. 512.

^d *Earl of Northampton's Case*, 12 Co. 133, 4; and see *Davis v. Lewis*, 7 Durnf. & E. 17. 19. *per* Ld. *Kenyon*, Ch. J. *Maitland v. Gouldney*, 2 East, 426. *Mills v. Spencer*, Holt *Ni. Pri.* 533. *Rosc. Evid.* 2 Ed. 298.

^e *Mills v. Spencer*, Holt *Ni. Pri.* 533.

per Gibbs, Ch. J.; and see 2 Bos. & P. 225. (a.) 2 Sel. *Ni. Pri.* 6 Ed. 1232.

Stockley v. Clement, 4 Bing. 162. 167.

12 Moore, 381. S. C.; and see *Tidd Prac.* 9 Ed. 651, 2. 1 Chit. *Pl.* 433.

^f *Maitland v. Gouldney*, 2 East, 426; and see *Lewis v. Walter*, 4 Barn. & Ald. 605. *M'Gregor v. Thwaites*, 3 Barn. & C. 24.

^g *M'Pherson v. Daniels*, 10 Barn. & C. 263. 5 Man. & R. 351. S. C.

lication^a. And in a subsequent case^b it was ruled, in an action for verbal slander, that if a defendant, at the time of speaking the words, give up the name of the person from whom he heard them, this is no ground of defence on the general issue; but if he prove at the trial, that he did in fact hear them from that person, it will go in mitigation of damages.

For publishing proceedings of a court of justice, &c.

Whether the publication of the proceedings of a court of justice, when those proceedings contain defamatory matter, is privileged, has never been solemnly decided; but the inclination of the courts appears to be against the existence of such a privilege^c: And it having been made a question, whether the matter of justification, if available, ought not to be pleaded^d, it has been usual to plead it, in cases of this nature. When words are actionable in themselves, a traverse of the special damage is immaterial and improper^e; but when they are not actionable, and the gist of the action is special damage, it may it seems be traversed^f. In an action on the case for a *malicious prosecution*, the plea of not guilty puts in issue the fact of the prosecution, and want of probable cause^g: but in an action for maliciously proceeding to outlawry, the plea of not guilty puts in issue the existence of probable cause only, and not the reversal of the outlawry^h.

For malicious prosecution.

For escape.

In an action for an *escape*, it is declared by a late statutory rule of pleading^b, that "the plea of not guilty will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings." And, by the statute 8 & 9 W. III. c. 27. §. 6. "no retaking on fresh pursuit shall be given in evidence, on the trial of any issue, in any action of escape against the marshal, &c. unless the same shall be specially pleaded; nor

^a *De Crespigny v. Wellesley*, 2 Moore & P. 695. 5 Bing. 392. S. C.

^b *Bennett v. Bennett*, 6 Car. & P. 568. per *Alderson*, B.

^c *Stiles v. Nokes*, 7 East, 493. Carr v. Jones, 3 Smith, 491. 503. S. C. *Lewis v. Clement*, 3 Barn. & Ald. 702. *Lewis v. Walter*, 4 Barn. & Ald. 605. 613. *Duncan v. Thwaites*, 3 Barn. & C. 556. 563. *Flint v. Pike*, 4 Barn. & C. 473. 476. 481; but see *Curry v. Walter*, 1 Esp. Rep. 456. 1 Bos. & P. 525. S. C. *Rex v. Wright*, 8 Durnf. & E. 293; and see 7 East, 504. 3 Smith, 503.

S. C. *Rex v. Fisher*, 2 Campb. 563. *Duncan v. Thwaites*, 3 Barn. & C. 556. 563.

^d *Curry v. Walter*, 1 Bos. & P. 525.

^e *Smith v. Thomas*, 4 Dowl. Rep. 333. 2 Scott, 546. 1 Hodges, 353. S. C.; and see *Porter v. Izat*, 1 Tyr. & G. 639. *Ante*, 350.

^f *Cotton v. Brown*, 4 Nev. & M. 831. 3 Ad. & E. 312. 1 Har. & W. 419. S. C.

^g *Drummond v. Pigou*, 2 Bing. N. R. 114. 2 Scott, 228. 1 Hodges, 190. S. C.

^h *R. Pl. H. 4 W. IV. Case*, reg. IV. § 1. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

"shall any special plea be received or allowed, unless oath be first made in writing by the defendant, and filed in the proper office, that the prisoner, for whose escape such action is brought, did escape without his consent, privity or knowledge." ^a In an action on the case against a carrier, it is declared by the above rule ^b, that "the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant, as a carrier for hire, or of the purpose for which they were received." And where an action was brought against a carrier, for the loss of goods above the value of *ten* pounds, a defence under the statute 11 Geo. IV. & 1 W. IV. c. 68. § 1. that the value of the goods was not declared at the time of delivering them to the carrier, must be specially pleaded, and cannot be given in evidence under the general issue ^c.

Against carriers.

The late statutory rules do not, we have seen ^d, contain any particular directions as to the mode of pleading in the action of *replevin*, or *trespass* to the person; though these actions are subject to the general rules and regulations applicable to all pleadings: and it is observable, that by one of these latter rules ^e, avowries and cognizances founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in *replevin* are within the rule,) are not to be allowed. In an action of *replevin*, the general issue, we have seen ^f, is *non cepit* ^g; by which the defendant puts in issue not only the taking of the cattle or goods, but also the taking in the place mentioned in the declaration ^h. And the defendant in this action, we have also seen ⁱ, may plead property in himself ^k, or a third person ^k, the question of property not being in issue on the plea of *non cepit* ^l; and where he goes for a return of the cattle or goods, he may *avow*, or make *cognizance*, &c. as stated in a former part of this chapter ^m.

Pleas in actions for wrongs, not affected by statutory rules.

In replevin.

^a As to the form of the *affidavit*, see *West v. Eyles*, 2 Blac. Rep. 1059; and see *Tidd Prac.* 9 Ed. 649, 50. 1 Chit. *Pl.* 434.

^b *R. Pl. H. 4 W. IV. Case, reg. IV. § 1.* 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

^c *Syms (or Simms) v. Chaplin*, 1 Nev. & P. 129. 13 Leg. Obs. 44. S. C.; and for the form of the plea, see 1 Chit. *Jun. Pl.* 284.

^d *Ante*, 337.

^e *R. Pl. Gen. H. 4 W. IV. reg. 5.* 5 Barn. & Ad. Append. iii. 10 Bing. 465. 2 Crompt. & M. 14.

^f *Ante*, 329.

^g Append. to *Tidd Prac.* 9 Ed. Chap. XLV. § 64.

^h *Johnson v. Wollyer*, 1 Str. 507; and see *Anon.* 2 Mod. 199. 1 Wms. Saund. 347. (1.) 1 Chit. *Pl.* 5 Ed. 537. *Steph. Pl.* 1 Ed. 183, 4.

ⁱ *Ante*, 330.

^k *Com. Dig. tit. Pleader*, 3 K. 12 *Gilb. Rep.* 150. 3 Chit. *Pl.* 1044.

^l *Gilb. Dist.* 4 Ed. 148, 9. 1 Chit. *Pl.* 5 Ed. 188. *Steph. Pl.* 1 Ed. 184. *k.*

^m *Ante*, 330; and see *Tidd Prac.* 9 Ed. 645. 1 Chit. *Pl.* 436.

In trespass to the person.

In an action of trespass to the person, the plea of not guilty may be properly pleaded, if the defendant committed no assault, battery, or imprisonment, &c.; but if he did, matter of justification or excuse must be pleaded specially^a. So where the plaintiff, being in custody of the marshal of the King's Bench, has been charged in execution on an attachment issuing out of the court of Exchequer, at the instance of the defendant, there must, it seems, be a special plea of justification under such writ^b. And the defendant must plead specially a release^c, or other matter in discharge of the cause of action^d.

In trespass quare clausum fregit.

In actions of trespass quare clausum fregit, it was formerly necessary for the plaintiff to prove, under the general issue, not only the committing of the trespass complained of, but also his possession, and right of possession, of the place where it was committed: and liberum tenementum, or other evidence of title or right to the possession, might have been given in evidence under the general issue^e. But the defendant could not have justified, under the general issue, cutting the posts and rails of the plaintiff, though erected upon the defendant's own land, there being no question raised as to the property remaining in the plaintiff^f. And, by a late statutory rule of pleading^g, it is declared that "in actions of trespass quare clausum fregit, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially." In this action, therefore, the defendant must deny the plaintiff's possession of the locus in quo, or that it is the close of the plaintiff, if necessary for his defence^h; or he must set up a right to the possession, or other matter in justification or excuse of the trespasses complained of, speciallyⁱ:

^a Co. Lit. 282, 3. Rol. Abr. 682. E.

Howson, 2 Man. & R. 226.

^b Briant v. Clutton, 1 Meeson & W. 408. 5 Dowl. Rep. 66. 12 Leg. Obs. 116. S. C. per Parke, Bolland, and Alderson, B.; Ld. Abinger, Ch. B. dissentiente.

^f Welsh v. Nash, 8 East, 404; and see Tidd Prac. 9 Ed. 652.

^c Com. Dig. tit. Pleader, 3 M. 12. 9 Went. 15. 3 Chit. Pl. 900. 1062.

^g R. Pl. H. 4 W. IV. Trespass, reg. V. § 2. 5 Barn. & Ad. Append. ix. 10 Bing. 471. 2 Crompt. & M. 23.

^d Bird v. Randall, 3 Bur. 1353; and see Tidd Prac. 9 Ed. 652. 1 Chit. Pl. 438.

^h Hughes v. Hughes, 1 Tyr. & G. 4. 2 Crompt. M. & R. 663. 4 Dowl. Rep. 532. 1 Gale, 302. S. C.; and see Smith v. Edwards, 1 Har. & W. 497. 4 Dowl. Rep. 621. 11 Leg. Obs. 403. 4 S. C.

^e Bartholomew v. Ireland, Andr. 108. Lambert v. Stroother, Willes, 222. Dodd v. Kyffin, 7 Durnf. & E. 354. Argent v. Durrant, 8 Durnf. & E. 403. Pearce v. Lodge, 12 Moore, 50. Johnson v.

ⁱ Co. Lit. 282, 3. 2 Rol. Abr. 682. E. Hallet v. Birt, 12 Mod. 120. Percy v. Walter, 6 Car. & P. 232.

and the defendant must plead specially a release ^a, or other matter, in discharge of the action ^b. And where, to a declaration for breaking and entering the plaintiff's close, the defendant pleaded first, not guilty; secondly, that the close was not the close of the plaintiff; and thirdly, that the close was the soil and freehold of the defendant; the court held that evidence of possession was sufficient to entitle the plaintiff to a verdict on the second plea ^c.

In an action of trespass *quare clausum fregit*, where the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, it is declared by a late statutory rule ^d, that "the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant, in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified." Under this rule, where a defendant pleaded a right of way for the inhabitant householders of *M.* to carry goods, and fetch water, and the jury found that they had a right of way to fetch water, and to water horses, but negatived the right of way to carry goods, the court held that, as to the right of way for fetching water, a verdict should be entered for the defendant, and as to the carrying of goods for the plaintiff; and that, as to the watering of horses, the verdict was inoperative ^e. And in *trespass* and *assault*, if the defendant justify more assaults than are charged in the declaration, he will not be required to prove the whole of his justification ^f. It is also a rule ^g, that "where, in an action of *trespass quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant, in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff, in respect of the trespasses which shall not be so justified: And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded

Pleas of rights of way, and common of pasture, &c. how construed, and effect of verdict thereon.

^a Com. Dig. tit. *Pleader*, 3 M. 12. 3 Chit. Pl. 930.

^b Bird v. Randall, 3 Bur. 1353.

^c Heath v. Milward, 2 Bing. N. R. 98. 2 Scott, 160. 1 Hodges, 198. S. C.

^d R. Pl. H. 4 W. IV. *Trespass, reg.* V. § 4. 5 Barn. & Ad. Append. x. 10 Bing. 471. 2 Crompt. & M. 24.

^e Knight v. Woore, 7 Car. & P. 258. 3 Bing. N. R. 3. 3 Scott, 326. S. C.

^f Atkinson v. Warne, 3 Dowl. Rep. 483. 1 Crompt. M. & R. 827. 5 Tyr. Rep. 481. 9 Leg. Obs. 491. S. C.

^g R. Pl. H. 4 W. IV. *Trespass, reg.* V. § 5, 6. 5 Barn. & Ad. Append. x. 10 Bing. 472. 2 Crompt. & M. 24.

that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively." ^a

In trespass *de bonis asportatis*.

In *trespass de bonis asportatis*, it was formerly incumbent on the plaintiff to prove, on the general issue, his property in the goods mentioned in the declaration ^b. But, by a late statutory rule of pleading ^c, it is declared that "in actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein:" and matter of *justification* or *excuse* must be specially pleaded in this action, as well as a release, or other matter in *discharge* of it. In *trespass* for seizing goods, in the possession and apparent ownership of the plaintiff, the defendant cannot set up the title of a third person, to defeat the action; for it would lead to great confusion, if a defendant were allowed to set up the title of others to goods which were not his own ^d.

In what cases general issue may be pleaded, by act of parliament.

In actions for distresses for poor rates.

Regularly, by the common law, where a man doth any thing by force of a warrant or authority, he must plead it specially ^e. But in order to protect ministers and officers of justice, in the execution of their offices, and to prevent the prolixity, difficulty and expense of special pleading, they are in many cases allowed by statute to plead the general issue, and give the special matter in evidence. Thus, by the statute 43 Eliz. c. 2. § 19 ^f, "if any action of *trespass*, or other "suit, shall happen to be attempted and brought against any person or "persons, for taking of any distress, making of any sale, or any other "thing doing by authority of that act, the defendant or defendants "in any such action or suit shall and may either plead not guilty, "or otherwise make avowry, or cognizance, or justification, for the

^a For cases in which the issue in *trespass* has been holden to be divisible, see *Richards v. Peake*, 2 Barn. & C. 918. *Bassett v. Mitchell*, 2 Barn. & Ad. 99. *Tapley v. Wainwright*, 5 Barn. & Ad. 395. 2 Nev. & M. 697. S. C. *Phythian (or Pythian) v. White*, 1 Meeson & W. 216. 4 Dowl. Rep. 714. 1 Tyr. & G. 515. S. C.

^b Tidd *Prac.* 9 Ed. 652.

^c R. P. H. 4 W. *Trespass*, reg. V. § 3. 5 Barn. & Ad. Append. x. 10 Bing. 471. 2 Crompt. & M. 24.

^d *Nelson v. Cherrill*, 1 Moore & S. 452. 8 Bing. 316. S. C.

^e Co. Lit. 283; and see Tidd *Prac.* 9 Ed. 652, 3.

^f This seems to have been the first instance in which the general issue was given by act of parliament.

"taking of the said distresses, making of sale, or other thing
 "doing by virtue of that act; alleging in such avowry, cognizance,
 "or justification, that the said distress, sale, trespass, or other thing,
 "whereof the plaintiff or plaintiffs complained, was done by authority
 "of that act, and according to the tenor purport and effect of that
 "act, without any expressing or rehearsal of any other matter or cir-
 "cumstance contained in that act." On this statute it has been holden,
 that in *trespass against overseers*, for taking a distress for poor rates,
 every matter of defence may still be given in evidence under the
 general issue^a; and a defence that the goods taken were not the
 goods of the plaintiff, need not therefore be pleaded^b.

By the statute 7 Jac. I. c. 5. "if any action, bill, plaint, suit upon
 "the *case, trespass, battery or false imprisonment*, shall be brought
 "in any of his majesty's courts at *Westminster* or elsewhere, against
 "any *justice of the peace, mayor or bailiff* of city or town corporate,
 "*headborough, port-reeve, constable, &c.* for or concerning any matter
 "cause or thing, by them or any of them done, by virtue or reason of
 "their or any of their office or offices, that it shall be lawful to and
 "for every such justice of peace, mayor, bailiff, constable, or other
 "officer or officers therein before named, and all others which in
 "their aid and assistance, or by their commandment, shall do any
 "thing touching or concerning his or their office or offices, to plead
 "the *general issue*, that he or they are not guilty, and to give such
 "special matter in evidence to the jury which shall try the same,
 "which special matter being pleaded had been a good and sufficient
 "matter in law to have discharged the said defendant or defendants
 "of the trespass, or other matter laid to his or their charge." In an
 action of *trespass* and false imprisonment, a constable may justify
 under the general issue, though he acted without a warrant, provided
 there was a reasonable charge of felony made, although he after-
 wards discharge the prisoner, without taking him before a magis-
 trate, and although it should turn out in fact that no felony was
 committed^b: but a private individual who makes the charge, and
 puts the constable in motion, cannot justify under the general
 issue; he must plead the special circumstances by way of justifi-

Against justices
 of the peace,
 constables, &c.

^a *Haine v. Davey*, 6 Nev. & M. 356; and see stat. 21 Jac. I. c. 12. § 3. by which overseers are declared to be entitled to the benefit of the stat. 7 Jac. I. c. 5. as to pleading the general issue, in actions against justices, &c. *Post*, 380.

^b *Samuel v. Payne*, Doug. 359. *Stone-*

house v. Elliott, 6 Durnf. & E. 315. *Hobbs v. Branscombe*, 3 Campb. 420. *McCloughan v. Clayton*, Holt N. Pri. 478. *Beckwith v. Philby*, 6 Barn. & C. 635. 9 Dowl. & R. 487. S. C.; and see *Tidd Prac.* 9 Ed. 653.

cation, in order that it may be seen whether his suspicions were reasonable ^a.

Against church-
wardens, and
overseers, &c.

By the statute 21 Jac. I. c. 12. ^b, "all *churchwardens*, and persons " called *sworn men*, executing the office of churchwardens, and all " *overseers* of the poor, and all others which in their aid and assist- " ance, or by their commandment, shall do any thing touching or " concerning his or their office or offices, shall be enabled to receive " and have such benefit and help, by virtue of the said act of 7 Jac. " I. c. 5. to all intents constructions and purposes, as if they had

Against persons
exercising
public employ-
ments, &c.

" been specially named therein." The provisions of the statute 21 Jac. I. c. 12. are extended by the 42 Geo. III. c. 85. § 6. to all persons having, or holding, or exercising, or being employed in any public employment, or in any office station or capacity, either civil or military, either in or out of this kingdom, and having, by virtue thereof, power or authority to commit persons to safe custody.

Against officers
of customs, or
excise, &c.

And there are similar provisions in other statutes, relating to officers of the *customs* ^c, and *excise* ^d; officers of the *army*, *navy*, and *marines* ^e; members and ministers of *courts martial* ^f; commissioners for the affairs of *taxes* ^g, and commissioners, or assistant commissioners, under the *poor law* amendment act ^h, &c.

For irregular
distresses.

By the statute 11 Geo. II. c. 19. § 21. for the more effectual securing the payment of rents, and preventing frauds by tenants, " in " all actions of *trespass*, or upon the *case*, to be brought against any " person or persons entitled to rents or services of any kind, his her " or their bailiff or receiver, or other person or persons, relating to " any entry by virtue of that act or otherwise, upon the premises " chargeable with such rents or services, or to any distress or " seizure, sale or disposal of any goods or chattels thereupon, it " shall and may be lawful to and for the defendant or defendants in " such actions to plead the general issue, and give the special mat- " ter in evidence." This statute does not it seems extend to a seizure for a heriot custom ⁱ; and in *trespass* for taking goods, where the defence is a distress for rent, after a clandestine removal off the premises, it must be pleaded specially, and cannot be given

^a M^cCloughan v. Clayton, Holt Nl. Pri. 478; and see Mure v. Kaye, 4 Taunt.

34. Tidd Prac. 9 Ed. 653.

^b § 3.

^c 6 Geo. IV. c. 108. § 97.

^d 7 & 8 Geo. IV. c. 53. § 115; and see 23 Geo. III. c. 70. § 34. 25 Geo. III.

c. 37. § 23.

^e 6 Geo. IV. c. 108. § 97.

^f 11 Geo. IV. & 1 W. IV. c. 8. § 58.

^g 43 Geo. III. c. 99. § 70.

^h 4 & 5 W. IV. c. 76. § 104.

ⁱ Lloyd v. Winton, Barnes, 148. 2 Wils. 28. S. C. Say. Costs, 107.

in evidence under the general issue^a. On this statute, a plea of justification in *trespass*, as a distress for rent, stating that the plaintiff held and enjoyed the *locus in quo* as tenant to the defendant, at a certain rent, without shewing any reversion in him, has been holden to be good on demurrer^b. And where, in *trespass* for building upon and heightening the plaintiff's wall, and thereby obstructing his light, the defendant pleaded the general issue, and having proved at the trial that the wall was a party wall, and that he had acted under a *bona fide* impression that the provisions of the building act, 14 Geo. III. c. 78. § 43. justified him in raising the wall, the plaintiff was nonsuited, he not having given a notice of action, as required by § 100. of that act, the court held that the evidence was properly received under the general issue, and that the nonsuit was right^c.

It should also be observed, that in many other cases the defendant is allowed, by subsequent acts of parliament, to plead the general issue, and give the special matter in evidence at the trial^d; as in ac-

In other cases.

^a *Vaughan v. Davis*, 1 Rep. Rep. 257. *Furneaux v. Fotherby*, 4 Campb. 136. *Postman v. Harrell*, 6 Car. & P. 225.

^b *Hooker v. Nye*, 1 Crompt. M. & R. 258. 4 Tyr. Rep. 777. S. C.; and see *Twigg v. Potts*, 1 Crompt. M. & R. 89. *Same v. Same*, 4 Dowl. R. 266; but this plea does not seem to have been necessary; as the defendant might have pleaded not guilty, and given the special matter in evidence, by the stat. 11 Geo. II. c. 19. § 21.

^c *Wells v. Ody*, 7 Car. & P. 22. 2 Crompt. M. & R. 128. 5 Tyr. Rep. 725. 1 Gale, 137. S. C.; and see *Same v. Same*, 1 Meeson & W. 452. 1 Tyr. & G. 715. 12 Leg. Obs. 100. S. C.

^d The principal statutes by which the defendant is allowed to plead the general issue, and give the special matter in evidence at the trial, since the 11 Geo. II. c. 19. § 21. are the 23 Geo. II. c. 27. § 23. (court of requests' act for *Westminster*;) *id.* c. 30. § 24. (the like, for the Tower hamlets;) *id.* c. 33. § 13. (the like, for *Middlesex*;) 14 Geo. III. c. 78. § 100. (Building act;) 39 Geo. III. c. lviii. § 18.

(for regulating the rates of portage in *London*, &c.;) *id.* c. lxxix. § 185. (*West India Dock* act;) 39 & 40 Geo. III. c. 47. (*Hackney Coach* act;) *id.* c. xlvii. § 151. (*London Dock* act;) 43 Geo. III. c. 99. § 70. (relating to duties under the management of the commissioners for the affairs of taxes;) 50 Geo. III. c. 41. § 34. (*Hawkers' & Pedlars' act*;) 53 Geo. III. c. 121. § 87. (*New Street* act;) *id.* c. 127. § 12. (for recovery of church rates, and tithes;) 55 Geo. III. c. 153. § 54. (relating to postage of letters;) 57 Geo. III. c. 46. § 17. (relating to copper tokens, &c.;) 3 Geo. IV. c. 71. § 6. (to prevent the cruel and improper treatment of cattle;) *id.* c. 126. § 147. (*General Turnpike* act;) *id.* c. cvi. § 30. (relating to the making and sale of bread in *London*, &c.;) 4 Geo. IV. c. 62. § 62. (relating to duties on post horses;) 6 Geo. IV. c. 16. § 44. (*Bankrupt* act;) *id.* c. 125. § 84. (relative to pilots and pilotage;) 7 & 8 Geo. IV. c. 29. § 75. (relative to larceny, &c.;) *id.* c. 80. § 41. (relative to malicious injuries to property;) *id.* c. lxxv. § 93. (for regulation of the watermen and lightermen of the river

For things done in pursuance of court of requests' acts, &c.

tions for things done in pursuance of the court of requests' acts, &c. In the court of requests' act for *London*, (39 & 40 Geo. III. c. civ.) there is a clause, (§ 18.) authorizing the defendant, when sued for any thing done in pursuance of that act, to plead the general issue, and give the special matter in evidence; but this act is repealed by the 5 & 6 W. IV. c. xciv. for amending and consolidating the acts for the recovery of small debts in *London*, &c. and there is no such clause in the latter act.

Proviso, authorizing persons to plead general issue, by act of parliament.

It has been already seen ^a, that in the law amendment act ^b, (which authorizes the judges of the superior courts of common law at *Westminster*, or any eight or more of them, by any rule or order to be by them from time to time made, in term or vacation, to make alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings, in actions at law,) there is a *proviso*, that "no rule or order made in pursuance thereof, should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was, or thereafter should be entitled so to do, by virtue of any act of parliament, then or thereafter to be in force." On this *proviso*, it has been observed by a learned baron ^c, that 'there is certainly an inconvenience arising from pleading the general issue under a statute, in the general form; and perhaps, in such a case, the plaintiff might take out a summons before a judge, to inquire what defence the party intended to set up under it ^c. The judges,' he added, 'were desirous that some regulations should be made as to the form in which a general issue under a statute should be pleaded; but they thought they were prohibited by the above act from so doing.' ^c

Observations thereon.

Defendant not allowed to plead specially, with general issue given by statute.

Where a defendant may, by statute, give matter of justification in evidence under the general issue, as in *trespass* for breaking and entering the plaintiff's dwelling-house, and seizing and detaining his

Thames;) 9 Geo. IV. c. 60. § 48. (relating to importation of corn;) 10 Geo. IV. c. 44. § 41. (Metropolitan police act;) 11 Geo. IV. & 1 W. IV. c. 64. § 28. (Beer act;) 4 & 5 W. IV. c. 49. § 29. (relating to weights and measures;) *id.* c. 76. § 104. (Poor law amendment act;) 5 & 6 W. IV. c. 50. § 109. (General Highway act;) *id.* c. 76. § 133. (Municipal corporation act;) 6 & 7 W. IV. c. 8. (Mutiny act;) and *id.* c. cxxxvii. § 85. (court

of requests' act for *Westminster*). And for other statutes, by which the defendant is allowed to plead the general issue, and give the special matter in evidence at the trial, see the *Index to Ruffhead's statutes*, vol. ix. tit. *General issue*, and the subsequent *Indexes* thereto.

^a *Ante*, 337.

^b 3 & 4 W. IV. c. 42. § 1.

^c Mr. Baron *Alderson*, in *Wells v. Ody*, 7 Car. & P. 25.

goods, the defendant will not be allowed to plead the general issue, and also a special plea of justification, that he entered the house as landlord, to seize the goods on a distress for rent^a.

It will next be proper to notice the pleas in actions by and against bankrupts, and insolvent debtors, or their respective assignees; and against executors and administrators, or heirs and devisees. Pleas in actions by and against bankrupts, &c.

The bankruptcy of the plaintiff^b, or his discharge under an insolvent act^c, after the cause of action accrued, might formerly have been given in evidence under the general issue in *assumpsit*; though they were sometimes pleaded specially: And where the plaintiff, a bankrupt, having sued out a *latitat*, the defendant, before declaration, paid the debt to the assignees, the court held, that in an action by *bill*, this payment might be given in evidence under the general issue^d. But, in an action by the provisional assignee of a bankrupt, the fact of the bankrupt's estate having been assigned by the plaintiff to new assignees, between the time of issuing the *latitat*, and delivery of the declaration, was holden to be no ground of nonsuit, upon a plea of *non assumpsit*; and that if it were an answer to the action, it should have been pleaded specially^e. So, a plea in bar, stating that a commission of bankrupt issued against the plaintiff in *Ireland*, under which he was duly found, adjudged and declared a bankrupt, without alleging that he was in fact a bankrupt, was holden to be bad^f; such a plea should have stated the trading, petitioning creditor's debt, and act of bankruptcy^g. And now, since the late statutory rules of pleading, the bankruptcy of the plaintiff, or his discharge under the insolvent act, must be pleaded specially. Bankruptcy of plaintiff.

The defendant cannot give his bankruptcy^h, or discharge under the insolvent debtors' actⁱ, in evidence under the general issue. But, by the statute 5 Geo. II. c. 30. § 7. "in case a bankrupt shall, after obtaining his certificate, be prosecuted or im- Of defendant.
By stat. 5 Geo. II. c. 30. § 7.

^a Neale v. Mackenzie, 1 Crompt. M. & R. 61. 4 Tyr. Rep. 670. 2 Dowl. Rep. 702. S. C.; but see Twigg v. Potts, 1 Crompt. M. & R. 89. Hooker v. Nye, *id.* 258. 4 Tyr. Rep. 777. S. C. where such a justification was pleaded specially, with the general issue.

^b 3 Chit. Pl. 4 Ed. 918. (a.) 1 Chit. Jun. Pl. 250.

^c Scott v. Clare, 3 Campb. 236.

^d Crofton v. Poole, 1 Barn. & Ad. 568.

^e Page v. Bauer, 4 Barn. & Ald. 346; and see Tidd *Prac.* 9 Ed. 647.

^f Guinness v. Carroll, 2 Man. & R. 132: and see Guinness v. Carroll, 1 Barn. & Ad. 459.

^g Gowland v. Warren, 1 Campb. 363.

^h Bircham v. Creighton, 3 Moore & S. 345. 10 Bing. 11. S. C.

"pleaded for any debt, due before such time as he she or they became bankrupt, such bankrupt shall and may plead in general, that the cause of such action or suit did accrue before such time as he she or they became bankrupts, and may give that act and the special matter in evidence; and the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of that act, shall be allowed to be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate; and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud, or unless the plaintiff in such action can make appear any concealment by such bankrupt, to the value of *ten* pounds." Under this statute, a bankrupt's certificate allowed after the filing of the plaintiff's bill, and before plea pleaded, was holden to be evidence to support the general plea of bankruptcy, given by the statute^a. And a plea, in the general form, was deemed sufficient to entitle a bankrupt to the benefit of the statute 49 Geo. III. c. 121. § 8. which discharged him, after having obtained his certificate, of all demands at the suit of a surety, or person liable for his debt, who had paid the same after the issuing of the commission, in like manner, to all intents and purposes, as if such person had been a creditor before the bankruptcy^b. Where the certificate was allowed after plea pleaded, it seems that the bankruptcy must have been pleaded *specially*, and not in the general form prescribed by the statute 5 Geo. II. c. 30. § 7^c: And a certificate obtained at *Newfoundland*, under the 49 Geo. III. c. 27. § 8. did not entitle the defendant to be discharged, on entering a common appearance, but must have been pleaded in bar^d.

By stat. 6 Geo.
IV. c. 16.

The statute 5 Geo. II. c. 30. is repealed by the 6 Geo. IV. c. 16. § 1. But there is a clause in the latter statute^e, similar to the *seventh* section of the former, that "any bankrupt who shall, after his certificate shall have been allowed, have any action brought against him, for any debt claim or demand, thereby made proveable under the commission against such bankrupt, may plead in general, that the cause of action accrued before he became bankrupt^f, and may

^a *Harris v. James*, 9 East, 82.

^b *Westcott v. Hodges*, 5 Barn. & Ald. 12; but see *Stedman v. Martinant*, 12 East, 664. *comb. contra*; and see stat. 6 Geo. IV. c. 16. § 52.

^c *Tower v. Cameron*, 6 East, 413.
Lindo v. Simpson, 2 Smith R. 659. Sharpe

v. Witham, 1 M'Clel. & Y. 360. S. P.; but see *Quin v. Keefe*, 2 H. Blac. 553.

^d *Philpotts v. Reed*, 3 Moore, 244. 623.
1 Brod. & B. 18. 294. S. C.; and see *Tidd Proc.* 9 Ed. 647, 8.

^e § 126.

^f For the general form of a plea of

"give that act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate." On this statute it has been holden, that a certificate under a second commission, where the estate did not pay 15*s.* in the pound, may be given in evidence under a general plea of bankruptcy^a: such a plea, however, ought to pursue the terms of the statute, and conclude to the country^b. And it seems that under this statute^c, no action can be maintained against a certificated bankrupt, for a debt due before his commission, although he has compounded with his creditors before his commission, and his effects have not produced 15*s.* in the pound under it^d. A certificate obtained after the last mentioned statute, on a commission of bankruptcy issued before, may be proved by production of the certificate duly allowed^e.

Decisions thereon.

A general form of pleading is given by the statute 7 Geo. IV. c. 57^f. to *insolvent debtors* discharged under it. And if a defendant give a bill of exchange for a debt from which he has been discharged by the insolvent act, and an action be brought on that bill, he must plead his discharge^g. But a plea to an action of *debt* for goods sold and delivered, and on an account stated, that the defendant was discharged by order of the insolvent debtors' court, of and from the several debts and causes of action, *if any*, in the declaration mentioned was, we have seen^h, holden to be bad on special demurrer, for hypothetically and not directly confessing the cause of action sought to be avoidedⁱ.

Discharge of insolvent debtors.

In actions by *assignees* of a bankrupt, if they are stated to be so in the declaration, the defendant may deny generally that they are assignees^k; or he may deny specially that the bankrupt was a trader^l, or the petitioning creditor's debt^m, or act of bankruptcyⁿ. In an

In actions by or against assignees of bankrupt, or insolvent debtor, &c.

the defendant's bankruptcy and certificate before action, see 3 Chit. Pl. 911. 913, &c. 1 Chit. Jun. Pl. 247.

^a Robertson v. Score, 3 Barn. & Ad. 338.

^b Sheen v. Garrett, 6 Bing. 686. 4 Moore & P. 525. S. C.

^c § 127.

^d Eicke v. Nokes, 1 Moody & M. 303; and see Robertson v. Score, 3 Barn. & Ad. 338.

^e Taylor v. Welsford, 1 Moody & M. 503. *per* Id. Tenterden, Ch. J.

^f § 61.

^g 1 Chit. Jun. Pl. 317; and see Philpot v. Aslett, 2 Dowl. Rep. 669. 1 Cromp. M. & R. 85. 4 Tyr. Rep. 729. S. C.

^h *Ante*, 359.

ⁱ Gould v. Lasbury (or Raspberry) 4 Tyr. Rep. 863. 1 Cromp. M. & R. 254. 2 Dowl. Rep. 707. S. C.; and see Margetts v. Bayes, 1 Har. & W. 685. 6 Nev. & M. 228. S. C.

^k 1 Chit. Jun. Pl. 230.

^l *Id.* 228.

^m *Id.* 229.

ⁿ *Id.* 230.

action, however, by the assignees of a bankrupt, the defendant, if he mean to dispute the petitioning creditor's debt, &c. must give the notice of his intention required by the statute 6 Geo. IV. c. 16. § 90 ^a; and a plea that the party was not duly declared a bankrupt, does not operate as such notice ^b. In actions against assignees of a bankrupt or insolvent, it is not necessary or usual to state on the record, the character in which they are sued: And in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, it is declared by a late statutory rule ^c, that "the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied."

Against executor, or administrator.

In an action against an *executor* or *administrator*, either at common law, or by the law amendment act, (3 & 4 W. IV. c. 42. §§ 2. 14.) the defendant may plead any matter in defence of the action, which his testator or intestate might have pleaded: and, in addition thereto, he may deny the character in which he is sued, by pleading *ne unques executor* ^d, or *administrator* ^e; or, admitting it, he may plead that *no assets* have come to his hands ^f, or that he has *fully administered* them; and that either generally ^g, or specially before notice of a bond debt ^h, or with the exception of assets to a certain amount which are not sufficient to satisfy the plaintiff ⁱ: or he may plead a *retainer* to pay his own debt, of equal or superior degree ^k, or debts of a superior degree due to third persons, on bonds ^l, or judgments ^m, &c. But *plene administravit* is no bar to an action against an executor, upon a covenant by the testator, where the executor has paid over the residue within *six* months after probate ⁿ. And where an administrator, being under terms to plead issuably, pleads inconsistent pleas, *e. g.* *plene administravit* and his own bankruptcy, the plaintiff may

^a For this statute, and the form of notice and proceedings thereon, see Tidd *Prac.* 9 Ed. 668, 9.

^b Moon v. Raphael, 7 Car. & P. 115. 2 Bing. N. R. 310. 1 Hodges, 289. S. C.

^c R. Pl. Gen. H. 4 W. IV. reg. 21. 5 Barn. & Ad. Append. vii. 10 Bing. 469. 2 Crompt. & M. 19, 20.

^d Com. Dig. tit. *Pleader*, 2 D. 7. 3 Chit. Pl. 941. 1 Chit. Jun. Pl. 295.

^e Com. Dig. tit. *Pleader*, 2 D. 13. 3 Chit. Pl. 942. 1 Chit. Jun. Pl. 316.

^f Com. Dig. tit. *Pleader*, 2 D. 9.

^g Com. Dig. tit. *Pleader*, 2 D. 9. 3 Chit. Pl. 943.

^h 3 Chit. Pl. 971.

ⁱ *Id.* 945.

^k Com. Dig. tit. *Pleader*, 2 D. 9. 3 Chit. Pl. 946.

^l Com. Dig. tit. *Pleader*, 2 D. 9. 3 Chit. Pl. 948.

^m Com. Dig. tit. *Pleader*, 2 D. 9. 3 Chit. Pl. 947. 971; and see Tidd *Prac.* 9 Ed. 644.

ⁿ Davis v. Blackwell, 2 Moore & S. 7. 9 Bing. 5. S. C.

sign judgment as for want of a plea^a. So, where the defendant, in an action against an administrator, after obtaining time to plead upon the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*, the court gave the plaintiff leave to sign judgment as for want of a plea; the defendant having, since the commencement of the action, admitted by letter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand^b. Where the defendant, as executrix, pleaded no assets, without any averment of *plene administravit*, and the plaintiff replied assets in hand, the court held that upon this issue, the defendant might shew assets exhausted by payment; and the jury having found such to be the fact, the court refused to grant a new trial, or to enter judgment *non obstante veredicto*^c.

In an action against an *heir* or *devisee*, the defendant, in addition Heir, or devisee. to any matter which might have been pleaded by the ancestor or devisor, may either deny the character in which he is sued; or, admitting it, he may plead that he has *nothing by descent*^d, or *devise*^e, either generally or specially, *viz.* that he has nothing but a reversion after an estate for life or years^f; or that he has *paid* debts of an equal or superior degree, to the amount of the assets descended or devised^g, or that he *retains* the assets to satisfy his own debt, of equal or superior degree^h, or debts of a superior degree due to third personsⁱ. The heir, if an *infant*, might also formerly have prayed that the *parol* might demur, till he was of *full* age: but this privilege, we have seen^k, is now taken away by the statute 11 Geo. IV. & 1 W. IV. c. 47^l.

Pleas were formerly *entitled* generally of the term in which they Title of pleas, &c. were pleaded, unless where matter of defence had arisen after the

^a *Serie (or Searle) v. Bradshaw*, 4 Tyr. Rep. 69. 2 Crompt. & M. 148. 2 Dowl. Rep. 289. S. C.

^b *Roberts v. Wood*, 3 Dowl. Rep. 797. 10 Leg. Obs. 332. S. C. And for pleas, &c. in actions by and against *executors* and *administrators*, see Lawes on Pleading, Chap. XXI.

^c *Reeves v. Ward*, 2 Bing. N. R. 235. 2 Scott, 390. 1 Hodges, 300. S. C.

^d Com. Dig. tit. *Pleader*, 2 E. 3. 3 Chit. Pl. 973, 4.

^e 3 Chit. Pl. 973, 4; and see stat. 3 W. & M. c. 14. § 6. 11 Geo. IV. & 1 W. IV. c. 47. § 7. 3 & 4 W. IV. c. 104.

^f Com. Dig. tit. *Pleader*, 2 E. 3.

^g *Id. ib.*

^h *Id. ib.*

ⁱ Tidd Prac. 9 Ed. 644, 5. 936, &c. Sup. thereto, 1830. p. 761, &c.

^k *Ante*, 320, 21.

^l § 10.

first day of the term, in which case they were entitled specially of a subsequent day; or if pleaded in vacation, they were entitled of the preceding term. But, by a late statutory rule of pleading ^a, it is declared that "every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date." Therefore, where a plea is dated on a day subsequent to that on which it is delivered, the plaintiff's attorney may, it seems, treat it as a nullity, and sign judgment as for want of a plea ^b. This rule, however, refers only to actions over which the courts of common law have a concurrent jurisdiction; and therefore it does not extend to *real* actions, or revenue causes ^c.

Commence-
ment of pleas.

Pleas to the jurisdiction of the court, or in abatement, could not have been formerly pleaded after making a full defence ^d. And they were both usually begun by defending the wrong, or force, and injury, when, &c. which was considered as making only *half* defence ^e: for the "&c." implied only half defence, in cases where such defence was to be made, but was understood as a *full* defence, if that were necessary ^f. Pleas in bar began in the same manner: But, by a late statutory rule of pleading ^g, it is declared that "no formal defence shall be required in a plea, and it shall commence as follows: "The said defendant, by —— his attorney, (or "in person," &c.) says that——." The court, however, will not set aside a plea, on the ground of its commencing with a formal defence ^h.

No formal de-
fence required.

Actionem non,
&c.

Where the plea admitted the cause of action, and avoided it by matter of discharge *ex post facto*, it was formerly necessary for the defendant, at the commencement of his plea, to state that the plaintiff ought not to have his action, (*actionem non*, &c.) But where the matter of the plea shewed there never was a good cause of action, it was usual to state that he ought not to be charged (*onerari non debet*,) with the debt sued for; as where, in *debt* on bond, he pleaded in avoidance of it, or *riens per discent* ⁱ. And now, by a late statutory rule

When dispensed

^a R. Pl. Gen. H. 4 W. IV. reg. 1. 5 Barn. & Ad. Append. i. 10 Bing. 404. 2 Crompt. & M. 11.

^b *Hough v. Bond*, 1 Meeson & W. 314; but see *Newnam v. Hanny*, 5 Dowl. Rep. 259. 13 Leg. Obs. 237, 8. S. C.

^c *Miller v. Miller*, 1 Hodges, 31. 1 Scott, 387. 3 Dowl. Rep. 408. 9 Leg. Obs. 475. S. C.

^d *Steph. Pl.* 436; and see 1 Chit. Pl.

468. 1 Chit. Jun. Pl. 17. Tidd Prac. 9 Ed. 637.

^e Tidd Prac. 9 Ed. 637. (k.)

^f *Id.* (l.)

^g R. Pl. Gen. H. 4 W. IV. reg. 10. 5 Barn. & Ad. Append. v. 10 Bing. 467. 2 Crompt. & M. 17.

^h *Bacon v. Ashton*, 5 Dowl. Rep. 94. 12 Leg. Obs. 101. S. C.

ⁱ *Brown v. Cornish*, 2 Salk. 516.

of pleading^a, it is declared that "in a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect: and all pleas pleaded without such formal part as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action: provided, that nothing therein contained shall extend to cases where an *estoppel* is pleaded." Upon this rule it has been holden, that the statement of *actionem non* is dispensed with, in a plea which is pleaded to the whole of one of several counts of a declaration^b. But it has been doubted, whether a plea directly and expressly denying the facts alleged in one count of the declaration, and wholly inapplicable to the other causes of action stated in the declaration, but without any introductory statement professedly limiting its application to the first count, is to be considered as a plea to that count only, or as an informal answer to the whole declaration^c.

with, by statutory rule, and decisions thereon.

The body or substance of the plea, &c. is not affected by the late statutory rules of pleading; except that it is declared by one of them^d, that "no *venue* shall be stated in the body of the declaration, or in any subsequent pleading^e: provided, that in cases where local description is now required, such local description shall be given."^d The forms of pleas are various, according to the nature of the action, and grounds of defence to which they are adapted^e. The general requisites of a plea are first, that it be adapted to the nature of the action, and conformable to the count^f; and, taken collectively, answer the whole declaration: for if any part of the declaration be left unanswered, it operates as a discontinuance. If a plea begin as an answer to the whole, but in truth the matter pleaded be only an answer to part, or *vice versa*^g, the whole plea is naught, and the plaintiff may demur^h: And where a plea professes to answer the whole of

Body of plea, &c.

Forms of pleas, and their general requisites.

^a R. Pl. Gen. H. 4 W. IV. reg. 9. 5 Barn. & Ad. Append. v. 10 Bing. 497. 2 Crompt. & M. 17.

^b Bird v. Higginson, 4 Nev. & M. 505. 2 Ad. & E. 696. 1 Har. & W. 61. S. C.; and see 4 Nev. & M. 508. (n.)

^c Worley v. Harrison, 5 Nev. & M. 173. 3 Ad. & E. 669. 1 Har. & W. 426. S. C. and see Putney v. Swann, 2 Meeson & W. 72. 5 Dowl. Rep. 296. S. C.

^d R. Pl. Gen. H. 4 W. IV. reg. 8. 5 Barn. & Ad. Append. v. 10 Bing. 467. 2 Crompt. & M. 16.

^e For the forms of pleas in bar, in the

different actions upon contracts and for wrongs, and in actions by and against particular persons, see the precedents referred to in this Chapter. *Ante*, 323, &c.

^f Co. Lit. 303. a.

^g Gray v. Pindar, 2 Bos. & P. 427; and see Hopkinson v. Tahourdin, 2 Chit. R. 303. Thomas v. Heathorn, 2 Barn. & C. 477. 3 Dowl. & R. 647. S. C. Clarkson v. Lawson, 6 Bing. 587. 4 Moore & P. 356. S. C. Mountney v. Watton, 2 Barn. & Ad. 673.

^h Hopkinson v. Tahourdiu, 2 Chit. R. 303. Thomas v. Heathorn, 2 Barn. & C.

a count or counts, and is no answer to any good part of them, the plaintiff, on demurrer, is entitled to judgment^a. But if a plea begin only as an answer to part, and be in truth but an answer to part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for the part unanswered, as by *nil dicit*; for if he demur, or plead over, the whole action is discontinued^b: Secondly, the plea at common law should be *single*, consisting only of one fact, or of several facts, making together one point: for if a plea contain duplicity, or allege several distinct matters which require several answers to the same thing, it is bad^c: Thirdly, it should be *certain*^d, in point of form as well as substance; but certainly to a common intent is sufficient^e: and that which is apparent to the court, by necessary collection out of the record, or is necessarily implied, need not be expressed^f; as in setting forth the feoffment of a manor, it is unnecessary to state livery and attornment^g. So, that which is alleged by way of conveyance or inducement to the substance of the action, need not be so certainly alleged as that which is the substance itself^h: Fourthly, every plea, for the sake of certainty, must be *direct* and *positive*, and not by way of argument or rehearsalⁱ: Fifthly, it should be so pleaded as to be *capable of trial*, by the court upon demurrer or *nul tiel record*, or by the jury upon an issue in fact^k.

477. 3 Dowl. & R. 647. S. C. Clarkson v. Lawson, 6 Bing. 266. 3 Moore & P. 605. S. C.; and see Phillips v. Howgate, 5 Barn. & Ald. 220. M'Curd v. Driscoll, 1 Cramp. & M. 618. 3 Tyr. Rep. 571. S. C. Stammers v. Yearley, 10 Bing. 35. 3 Moore & S. 410. S. C. Worley v. Harrison, 5 Nev. & M. 173. 3 Ad. & E. 669. 1 Har. & W. 426. S. C. *Ante*, 389.
^a Crump v. Adney, 1 Cramp. & M. 362. 3 Tyr. Rep. 279. S. C.; and see Bush v. Parker, 1 Bing. N. R. 72. 4 Moore & S. 588. S. C.

^b Weeks v. Peach, 1 Salk. 179. Market v. Johnson, *id.* 180. Gilb. C. P. 155. 157. Bullythorpe v. Turner, Willes, 480. Harvey v. Richards, 1 H. Blac. 645. Tippet v. May, 1 Bos. & P. 411; and see Earl of Manchester v. Vale, 1 Wms. Saund. 5 Ed. 28. (3.) 1 Chit. R. 132. (a.) Winstone v. Linn, 1 Barn. & C. 465, 6, 7. 2 Dowl. & R. 471, 2, 3. S. C. Rowles v. Lusty, 4 Bing. 428. 1 Moore & P. 102.

S. C.

^c Co. Lit. 304. (a.) Steph. Pl. 284, &c.; but see Rowles v. Lusty, 4 Bing. 428. 1 Moore & P. 102. S. C.

^d Co. Lit. 303. a. Steph. Pl. 1 Ed. 342, &c. And as to certainty of *place*, see *id.* 297, &c. certainty of *time*, *id.* 311, &c. quantity, quality, and value, *id.* 314, &c. and the names of persons, *id.* 319, &c.

^e Co. Lit. 303. b. Steph. Pl. 1 Ed. 380, 81.

^f Co. Lit. 303. b. Steph. Pl. 1 Ed. 357, &c.

^g For the cases on this subject, see 2 Wms. Saund. 5 Ed. 305. a. (13.)

^h Co. Lit. 303. a. Steph. Pl. 1 Ed. 374, &c.

ⁱ Co. Lit. 303. a. 304. a. Slade v. Drake, Hob. 295. Steph. Pl. 1 Ed. 384, &c.

^k Co. Lit. 303. b. Case of Abbot of Strata Mercella, 9 Co. 24, 5. Carstairs v. Rolleston, 1 Marsh. 207.

Sixthly, it should be *true*, and capable of proof; for truth is said to be the goodness and virtue of pleading, as certainty is the grace and beauty of it^a. Seventhly, the plea shall be taken most strongly against him that pleadeth it; for every man is presumed to make the best of his own case^b. But eighthly, *surplusage* shall never make the plea vicious, except where it is repugnant, or contrary to matter precedent^c. Lastly, it is a general rule in pleading, that an equivocal expression shall be construed against the party using it; but if the other party plead over, he thereby admits that the expression is used in that sense which will support the previous pleading, and so cures the informality^d.

In order to avoid prolixity, general forms of pleading are prescribed in particular cases, by various acts of parliament: as in actions against *bankrupts* who have obtained their certificates, by the statute 5 Geo. II. c. 30. § 7. and 6 Geo. IV. c. 16. § 126; or against *insolvents* who have been discharged under the statute 7 Geo. IV. c. 57. § 61; or where an action is brought in a superior court for a debt not exceeding 40*s.* in a case cognizable by the court of requests for *Westminster*, by the 6 & 7 W. IV. c. cxxxvii. § 86; in actions of *trespass*, or other suit, against any person or persons for taking any *distress*, or other act done by authority of the commission of *sewers*, or by authority of any laws or ordinances made by virtue of the said commission, by the 23 Hen. VIII. c. 5. § 11.; or by authority of the act for the relief of the *poor*, by the 43 Eliz. c. 2. § 19.*; and in making *avowries* or *cognizances*, upon distresses for rent, quit rents, reliefs, heriots, and other services, by the 11 Geo. II. c. 19. § 22: To which may be added, the form of the plea prescribed by the late statutory rules^f, where money is paid into court.

General forms
of pleading.

It should also be remembered, that by a clause in the statute 2 & 3 W. IV. c. 71. § for shortening the time of prescription in certain cases, it is enacted, that "in all actions upon the *case*, and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall be still deemed sufficient; and if the same

Right how al-
leged by claim-
ant, in actions
upon the case,
&c.

^a *Slade v. Drake*, Hob. 295; and see *Steph. Pl.* 1 Ed. 444, &c.

^b *Co. Lit.* 303. *b.*

^c *Id. ib.* *Steph. Pl.* 1 Ed. 417, &c.

^d *Hobson v. Middleton*, 6 Barn. & C. 295. 9 Dowl. & R. 249. 254. 256, 7. S. C. And for the several cases to illustrate the above rules, see *Com. Dig. tit.*

Pleader, E. &c. 1 Chit. *Pl.* 4 Ed. 451, &c. 463, &c.

^e *Ante*, 378, 9.

^f *R. Pl. Gen. H.* 4 W. IV. *reg.* 17. 5 Barn. & Ad. *Append.* vi. 10 Bing. 408. 2 *Crompt. & M.* 18. *Ante*, 312, 13.

^g § 5. *Ante*, 215.

In pleadings to actions of trespass, &c.

shall be denied, all and every the matters in that act mentioned and provided which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation:" And "in all pleadings to actions of *trespass*, and in all other pleadings, wherein, before the passing of that act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof *as of right*, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in the act, as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any *proviso*, exception, incapacity, disability, contract, agreement, or other matter therein before mentioned, or on any cause or matter of fact, or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence, on any general traverse or denial of such allegation." On this statute, a plea of enjoyment of right of common for *thirty* years before the commencement of the suit, has been holden to be sufficient, without saying that it was enjoyed *thirty* years *next* before its commencement^a. Upon a general traverse of an allegation under the above act, of a right of way enjoyed *as of right* for *forty* years, evidence is admissible of an agreement within that period, to pay a sum of money for permission to use the way^b; and it seems, that evidence of an annual payment for such permission, within the *forty* years, would be admissible, in support of an allegation of an interruption for a year and acquiescence therein^b. It also seems, that a special allegation of a deed or agreement is required, under the *seventh* section of the act, in those cases only where the deed or agreement *precedes* the *forty*, or *twenty* years; and that an agreement made *within* the particular period of *forty* or *twenty* years, may be given in evidence under the general traverse, whether such agreement be in writing or verbal^b.

Pleas of payment, tender, and set off.

Of payment.

Some of the most usual pleas in bar in actions upon contracts, are pleas of *payment*, *tender*, and *set off*, which it may therefore be proper to consider particularly, with the recent decisions thereon. The plea of *payment* is pleaded either to the whole, or part of the sum demanded by the declaration, and particulars of demand; and the

^a Jones v. Price, 3 Bing. N. R. 52. 3 Rep. 50. 3 Scott, 258. S. C.; but see Scott, 376. S. C.; and see Monmouth Canal Company v. Harford, 1 Cramp. M. & R. 614. 5 Tyr. Rep. 68. S. C. Beaumont v. Clarke, 2 Bing. N. R. 795. 5 Dowl. 1 Har. & W. 762. S. C.

^b Tickle v. Brown, 6 Nev. & M. 230.

form of the plea differs, where the money is paid to the plaintiff at the time appointed by the contract, or afterwards, and before the commencement of the action; or where it is paid into court, under the late statutory rules of pleading. Where the payment is of the plaintiff's whole demand, it must be pleaded specially, and cannot be given in evidence under the plea of *non assumpsit*^a; and a defendant cannot avail himself of an admission, on the part of the plaintiff, that he has been paid, under a plea of *set off* for money due on an account stated between the parties^b. In order to let in such evidence, a plea of payment must be put upon the record^b. But payments before action brought, which do not amount to a bar to the action, but merely go to reduce the plaintiff's demand, need not be specially pleaded; but may be given in evidence, in mitigation of damages, under a plea of *non assumpsit*^a. It has been doubted, however, whether, under this plea, payment of *part* of the sum claimed, after action brought, can be given in evidence in reduction of damages^c.

Of plaintiff's
whole demand.

It has been already seen^d, that where several breaches are assigned in *covenant*, the defendant may plead payment into court of one entire sum, in satisfaction of all the breaches^e. And where, to a declaration for 31*l.* on a bill of exchange, and distinct sums of 100*l.* for money paid, lent, interest, goods sold, and on an account stated, the defendant pleaded, as to the 31*l.* and as to 12*l.* parcel of the 100*l.* for goods sold, and as to the 100*l.* on the account stated, payment into court of 51*l.*, and alleged that the plaintiff had not sustained damage to a greater amount, in respect of so much of those causes of action as in the plea mentioned, the court held that this plea would have been clearly good to the declaration, except to the count on the bill of exchange; though they doubted whether it was good, for not specifying how much was paid on the bill^f. But where a declaration in *assumpsit* on a charterparty, with a count on an account stated,

Of one entire
sum, on several
counts, or
breaches.

^a Shirley v. Jacobs, 2 Bing. N. R. 86. 2 Scott, 157. 4 Dowl. Rep. 136. 1 Hodges, 214. 7 Car. & P. S. S. C. Lediard v. Boucher, *id.* 1; and see Brown v. Daubeny, 4 Dowl. Rep. 585. 11 Leg. Obs. 306, 7. S. C. *per Patterson*, J. Milligan v. Thomas, 4 Dowl. Rep. 573. Wright v. Skinner, 1 Tyr. & G. 277. 4 Dowl. Rep. 741. 1 Gale, 378. S. C.

^b Linley v. Polden, 3 Dowl. Rep. 780. 10 Leg. Obs. 349, 80. S. C.; and see Brown v. Daubeny, 4 Dowl. Rep. 585. 1 Har. & W. 646. 11 Leg. Obs. 306, 7. S. C. *per Patterson*, J.

^c Richardson v. Roberts, (Robertson or Robinson,) 1 Tyr. & G. 279. (s.) 762, 1 Meeson & W. 463. 5 Dowl. Rep. 82. S. C.; and see Goldsmid v. Raphael, 3 Scott, 385.

^d *Ante*, §15.

^e Marshall v. Whiteside, 1 Meeson & W. 188. 1 Tyr. & G. 485. 4 Dowl. Rep. 766. 1 Gale, 379. S. C.

^f Jourdain v. Johnson, 2 Cramp. M. & R. 564. 5 Tyr. Rep. 524. 1 Gale, 312. 4 Dowl. Rep. 534. S. C.; but see Mee v. Tomlinson, 5 Nev. & M. 624. 1 Har. & W. 614. S. C. *semb. contra*.

assigned three several breaches, viz. first, that defendant did not load a cargo; secondly, that he did not pay 20*l.* for four months' freight; and thirdly, that he did not pay 200*l.* found to be due on an account stated, to the plaintiff's damage of 300*l.*; a plea, as to 476*l.* 14*s.* 7*d.* parcel of the *sums* in the declaration mentioned, of payment of that sum before action, in satisfaction and discharge of all damages as to that sum, was holden to be insufficient^a. And where, upon a declaration consisting of two counts, the defendant paid into court enough to cover the demand in the first, and obtained a verdict on the second, but had omitted to plead the payment as required by the new rules, the court, we have seen^b, held that he was not entitled to costs^c.

Form of plea of payment.

Where the money was paid when it became due, the plea in *assumpsit* merely states the fact of payment, according to the defendant's promise; but where it was paid afterwards, and before the commencement of the action, the plea goes on to state that it was paid to and accepted by the plaintiff, in full satisfaction and discharge of the promise generally, or as to the sum to which the plea is applicable, and of all damages sustained by the plaintiff, by reason of the non-performance thereof^d. On a plea of payment to a declaration for money lent, the defendant is bound to prove the fact of payment, before the plaintiff gives any evidence^e. And where, in *debt* on simple contract, the defendant pleads payment of a certain sum, he must prove payment of that sum, even though it be laid under a *videlicet*, in order to entitle him to a verdict on the whole plea: But the plea may be taken *distributively*, and the issue found for the defendant as to the amount proved to be paid, and as to the residue for the plaintiff^f: And accordingly, where a defendant in *assumpsit* pleaded payment as to 20*l.* and payments were proved to the amount of 12*l.* 10*s.* only, the court held that the plaintiff could only recover 7*l.* 10*s.* as that part of the payment of 20*l.* which was not proved, and 1*s.* for the residue; and the fact of the plea having been pleaded after the delivery of the particulars of demand, which specified a claim to a larger amount, made no difference^g. The plea of payment of

Evidence thereon, &c.

^a Lorymer v. Vizeu, 3 Bing. N. R. 222.

^b *Ante*, 313, 14.

^c Adlard v. Booth, 1 Bing. N. R. 693.

^d Scott, 644. S. C.

^e 1 Went. 258. 1 Chit. Jun. Pl. 364.

366; and see Edwards v. Chapman, 1 Tyr. & G. 481. 1 Meeson & W. 231. 4 Dowl. Rep. 732. 1 Gale, 376. 12 Leg.

Obs. 180, 81. S. C.

^f Richardson v. Fell, 4 Dowl. Rep. 10. 10 Leg. Obs. 206. S. C.

^g Cousins v. Paddon, 2 Crompt. M. & R. 547. 5 Tyr. Rep. 535. 1 Gale, 306. 4 Dowl. Rep. 488. S. C.

^h Coxhead v. Huish, 7 Car. & P. 63. and see Probert v. Phillips, 2 Meeson & W. 40. 13 Leg. Obs. 223. S. C.

money into court, after action brought, has been treated of in a former chapter ^a.

A *tender* must be pleaded in *assumpsit* ^b, and *debt* on bond ^c, or simple contract; and may, we have seen ^d, be pleaded in *covenant* for the non-payment of rent ^e. The plea of *tender* is sometimes pleaded in bar of the action; but more frequently, in bar of damages only, or of *further* damages. In *debt* upon bond, conditioned to pay money at a certain day, if the defendant plead a *tender* at the day, and that he has always been ready, &c. it is a good plea in bar of the action ^f: for a *tender* and refusal are considered in this case as tantamount to payment ^g, and operate as a performance of the condition. But in *debt* on single bill, or for rent, &c., a tender can only be pleaded in bar of the *damages* occasioned by the non-payment of the *debt*; or, in *covenant* or *assumpsit*, of the *further* damages, beyond the amount of the sum tendered ^h. When a tender is pleaded in bar of the action, it may be pleaded with the general issue, or other plea, by leave of the court ⁱ: but when it is only pleaded in bar of *damages*, or *further* damages, the defendant is not allowed to plead *non assumpsit* ^k, or *non est factum* ^l, to the whole declaration, and a *tender* as to part; for one of these pleas goes to deny that the plaintiff ever had any cause of action, and the other partially admits it ^m.

Tender, when necessary to be pleaded.

In bar of action, or damages.

When pleaded, or not, with general issue.

In pleading a tender, it is not sufficient to state that the defendant is, and always has been ready to pay, but he must also state that he tendered and offered to pay ⁿ. And wherever the debt or duty arises

Form of plea.

^a *Ante*, Chap. XXV. p. 315, 16.

^b *Tidd Prac.* 9 Ed. 647.

^c *Id.* 651.

^d *Ante*, 557.

^e *Johnson v. Clay*, 7 Taunt. 496. 1 Moore, 200. S. C.; and as to the plea of *tender* in general, and mode of pleading it, see Com. Dig. tit. *Pleader*, 2 G. 2. 2 W. 28. 49. 3 Chit. Pl. 922. 1 Chit. Jun. Pl. 396, &c.

^f *Anon. Dyer*, 300. *Broom v. Pine*, Comb. 334. *Anon. Carth.* 133. *Giles v. Hartis*, 1 Ld. Raym. 254. 2 Salk. 622. 3 Salk. 343. *Carth.* 413. 12 Mod. 152. Comb. 443. *Holt*, 556. S. C.

^g *Squire v. Grevett*, 2 Ld. Raym. 961. 964. *per Ld. Holt*, Ch. J.; but see *Welsh v. Rose*, 4 Moore & P. 464. 6 Bing. 698. S. C.

^h *Broom v. Pine*, Comb. 334. *Giles v. Hartis*, 1 Ld. Raym. 254. 2 Salk. 622.

3 Salk. 343. *Carth.* 413. 12 Mod. 152.

Comb. 443. *Holt*, 556. S. C. *Birks v. Trippet*, 1 Wms. Saund. 5 Ed. 33. (2.)

ⁱ *Gerring v. Manning*, Barnes, 366.

Martin v. Kesterton, 2 Blac. Rep. 1093.

Tidd Prac. 9 Ed. 656.

^k *Kaye v. Patch*, T. 27 Geo. III. K. B.

MacLellan v. Howard, 4 Durnf. & E. 194.

Dougal v. Bowman, 2 Blac. Rep. 723. 3

Wils. 145. S. C.

^l *Jenkins v. Edwards*, 5 Durnf. & E.

97. *Orgill v. Kemshead*, 4 Taunt. 459;

and see *Birks v. Trippet*, 1 Wms. Saund.

5 Ed. 33. (2.)

^m *Tidd Prac.* 9 Ed. 655.

ⁿ *French v. Watson*, 2 Wils. 74; and

see *Horn v. Lewin*, 2 Salk. 584. *Birks v.*

Trippet, 1 Wms. Saund. 5 Ed. 33. (2.)

Finch v. Brook, 1 Scott, 70. 1 Bing. N.

R. 253. S. C.

*Tout temps
prist, and uncore
prist.*

Bringing money
into court.

Consequence of
neglect.

Plea, or notice,
of set off.

at the time of the contract, and is not discharged by a tender and refusal, the plea must state a *tout temps prist*, as well as *uncore prist*, or that the defendant *has always been, and still is* ready to pay the sum tendered^a. But where the debt or duty arises at a subsequent period as in the case of a bond conditioned for the payment of money on a particular day, it is sufficient to state that the defendant was then and afterwards, and still is ready to pay it. The defendant, however, must in general make a *profert in curiam*^b, or bring the money into court; and the sum tendered must be paid to the signer of the writs in the King's Bench, or prothonotaries in the Common Pleas, or to one of the masters in the Exchequer, who will give a receipt for it in the margin of the plea; and if not so paid, the plaintiff may, if the plea be pleaded to the whole sum in the declaration, consider it as a nullity, and sign judgment^c. But where, in an action of *debt*, the defendant pleaded the general issue as to part, and as to the other part a *tender*, but omitted to pay the money into court, judgment having been signed on that account as for want of a plea, the court set aside the judgment for irregularity^d.

At common law, if the plaintiff was indebted to the defendant in as much or even more than the defendant owed to him, yet he had no method of striking a balance; the only way of obtaining relief was by going into a court of equity^e. To remedy this inconvenience, it was enacted by the statute 2 Geo. II. c. 22. § 13. that "where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator and intestate, and either party, one debt may be set against the other; and such matter may be given in evidence upon the *general issue*, or pleaded in bar, as the nature of the case may require; so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon

^a *Giles v. Hardis*, 1 Ld. Raym. 254. 2 Salk. 622. 3 Salk. 548. Carth. 413. 12 Mod. 152. Comb. 443. Holt; 556. S. C. *Birks v. Trippet*, 1 Wms. Saund. 5 Ed. 33. (2.); and see *Sweatland v. Squire*, 2 Salk. 623. *Whitlock v. Squire*, 10 Mod. 81. *May v. Cooper*, Fort. 376. 5 Bac. Abr. tit. *Tender*, &c. H. 2, 3.

^b *Russel v. Williams*, 1 Lutw. 281. 283. *Brownlow v. Hewley*, id. 364. 365.

Com. Dig. tit. *Pleader*, 2 W. 28.

^c *Pether v. Shelton*, 1 Str. 639. *Bray v. Booth*, Barnes, 252; and see *Tidd Prac.* 9 Ed. 565. 622. *Ante*, 20.

^d *Chapman v. Hicks*, 2 Dowl. Rep. 641. 2 Crompt. & M. 633. S. C.

^e *Collins v. Collins*, 2 Bur. 820. 2 Ken. 530. S. C. *Green v. Farmer*, 4 Bur. 2220; and see *Tidd Prac.* 9 Ed. 663. 1 Chit. Pl. 434.

"what account it became due; or otherwise such matter shall not be allowed in evidence upon the general issue." On this statute it was holden, that a notice of set off could only be given with a plea of the general issue; and that if there were any other plea, the set off must have been pleaded^a. Therefore, where the general issue and the statute of limitations were pleaded, together with a notice of set off, the court held that a set off could not be given in evidence, but that it ought to have been pleaded^b. It has also been determined, that the plea of *non est factum*, in covenant for non-payment of rent, is not to be considered as a general issue, under which a defendant can give a notice of set off; for in covenant there is, properly speaking, no general issue^c, and if a verdict were found thereon for the plaintiff, there would be no means, in entering up the judgment, of setting off the debt due to the defendant^d. And as general issues are confined in their operation by the late statutory rules of pleading, and it is declared by one of them^e that a set off must be pleaded, it seems that it cannot now in any case be given in evidence under a notice; and accordingly, it has become the practice to plead it specially, which also prevents the necessity of proving the service of the notice at the trial^f. And this practice is sanctioned by a late case^g, where the defendant, in an action of debt for goods sold and delivered, and on an account stated, pleaded *nunquam indebitatus*, with a notice of set off, and the court held that a set off could not be given in evidence, but must be specially pleaded. A plea of set off, of a smaller sum than that to which the plea is applied, is bad^h.

Every plea ought to have its proper conclusionⁱ; When the general issue is pleaded, on the defendant simply denies some material

Conclusion of plea, at common law.

^a *Webber v. Venn*, 2 Car. & P. 310. Ry. & Mo. 413. S. C. per Abbott, Ch. J. 1 Chit. Pl. 5 Ed. 606. 3 Chit. Pl. 5 Ed. 932. (a.)

^b *Duncan v. Grant*, 2 Dowl. Rep. 683. 1 Crompt. M. & R. 383. 4 Tyr. Rep. 818. S. C.; but see *Coulson v. Jones*, 6 Esp. Rep. 50. per, Ld. Ellenborough, Ch. J. *Wells v. Crofts*, 4 Car. & P. 332. per Ld. Tenterden, Ch. J.

^c *Aule*, 356.

^d *Oldershaw v. Thompson*, 1 Stark. Ni. Pri. 311. 5 Maule & S. 164. 2 Chit. R. 388. S. C. Sel. Ni. Pri. 6 Ed. 535. 1 Chit. Pl. 5 Ed. 606; but see *Bul. Ni. Pri.* 181. *Gower v. Hunt*, Barnes, 290, 91. *semb. contra*.

^e R. Pl. H. 4 W. IV. *Assumpsit*, reg. I. § 3, 5 Barn. & Ad. Append. viii. 10 Bing. 470. 2 Crompt. & M. 21.

^f For the form of a plea of set off, see 3 Chit. Pl. 923, 931, &c. 968, &c. 1 Chit. Jun. Pl. 387, &c. And for a plea of mutual credit, in an action by the assignees of a bankrupt, see 1 Chit. Jun. Pl. 391.

^g *Graham v. Partridge*, 1 Meeson & W. 325. 1 Tyr. & G. 754. 5 Dowl. Rep. 108. 12 Leg. Obs. 140, 41. S. C.

^h *Mee v. Tomlinson*, 5 Nev. & M. 624. 1 Har. & W. 614. S. C.

ⁱ Co. Lit. 303. b.; and see 1 Chit. Pl. 4 Ed. 474, &c. *Steph. Pl.* 392, &c. 436, &c. *Tidd Prac.* 9 Ed. 662.

fact alleged in the declaration, he should conclude his plea by putting himself upon the country ^a: but where the plea advanced new matter in the *affirmative*, the defendant formerly concluded it with an *averment* or *verification*, and prayer of judgment *si actio*; or, in other words, by professing himself ready to verify the plea, and praying judgment if the plaintiff ought to have or maintain his action against him. An *avowry* however, wherein the defendant is considered as an actor, and which is in nature of a count, need not be averred ^b; nor pleas which are merely in the *negative*, because a negative cannot be proved. When a judgment, or other matter of record, is pleaded, the plea should conclude with a verification by the *record*: And where in *debt*, the matter of the plea shewed there never was a good cause of action, as in *debt* on bond against an heir, who pleaded *riens per descent*, the defendant, instead of concluding his plea by praying judgment if the plaintiff ought to have his action, formerly concluded it with a prayer of judgment, if he ought to be charged with the debt by virtue of the writing obligatory ^c. But, by a late statutory rule of pleading ^d, it is declared that "in a plea, or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any prayer of judgment; and all pleas, &c. pleaded without such formal prayer, shall be taken, unless otherwise expressed, as pleaded in bar of the whole action: provided, that nothing therein contained shall extend to cases where an *estoppel* is pleaded." It is also a general rule ^e, that "all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country: provided, that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial." But, notwithstanding these rules, a plea must still conclude with a verification, or to the country ^f; and a plea of the statute of limitations must conclude with a verification ^g.

By statutory rule.

Conclusion to plea of payment.

In *assumpsit*, a plea of payment at the time when the money became due, according to the terms of the contract, ought to conclude to the country ^h: but in *debt*, it is considered as a plea in confession

^a 2 Wms. Saund. 5 Ed. 337. (1.)

^b Co. Lit. 303. a.

^c Brown v. Cornish, 2 Salk. 516.

^d R. Pl. Gen. H. 4 W. IV. reg. 9. 5 Barn. & Ad. Append. v. 10 Bing. 467. 2 Crompt. & M. 17.

^e R. Pl. Gen. H. 4 W. IV. reg. 13. 5 Barn. & Ad. Append. vi. 10 Bing. 467. 2 Crompt. & M. 17; and see Tidd Prac.

9 Ed. 683, 4.

^f Knowles (or Snow) v. Stevens, 1 Crompt. M. & R. 26. 2 Dowl. Rep. 664. 4 Tyr. Rep. 1016. S. C.

^g Wheatley v. Williams, 1 Mounson & W. 583; and see Read v. Spear, 5 Dowl. Rep. 330.

^h Brown v. Cornish, 2 Salk. 516. 1 Chit. Jun. Pl. 363.

and avoidance, and must conclude with a verification^a. So, where the defendant pleaded payment as to part of the demand, and as to the residue that he did not promise as alleged in the declaration, concluding to the country; the plaintiff having demurred specially, alleging duplicity, and the want of a proper conclusion with a verification, the court held the plea to be bad on the latter ground^b. A plea of payment of money into court, beginning "as to so much, parcel," &c. and concluding without any prayer of judgment, is bad on special demurrer^c. And where, to a declaration on a bill of exchange, with a count for work and labour, the defendant pleaded as to 35*l.* part of the money in the declaration mentioned, that the bill, as to that sum, was an accommodation bill, concluding with a verification; and as to the sum of 40*l.* other parcel of the sums mentioned in the declaration, he pleaded payment of that money into court, concluding with a verification; and as to the residue of the sums, and the promise in the last count of the declaration mentioned, and not before pleaded to, *non assumpsit*; upon the first plea the plaintiff took issue, and, as to the last plea, added a *similiter*, but said nothing as to the plea of payment of money into court; at the trial, the plaintiff obtained a verdict, with 30*l.* damages; and the court held that there was no ground for arresting the judgment^d.

Of payment of money into court.

The plea of tender formerly concluded, when it was in bar of the action, by praying judgment if the plaintiff ought to have or maintain his action, generally: but where it was only in bar of *damages*, the defendant, in pleading a tender in *debt*, ought to have concluded his plea, by praying judgment if the plaintiff ought to have or maintain his action, to recover any damages against him; for in this action, the debt is the principal, and the damages are only accessory: but in *assumpsit*, the damages are the principal; and therefore, in pleading a tender in the latter action, the defendant ought to conclude his plea with a prayer of judgment, if the plaintiff ought to have or maintain his action, to recover any *more or greater* damages than the sum tendered, or *any* damages by reason of the non-payment thereof^e.

Of tender.

^a Goodchild v. Pledge, 1 Meeson & W. 363. 1 Tyr. & G. 638. 5 Dowl. Rep. 89. 12 Leg. Obs. 116, 17. S. C.

^b Ansell (or Ensell) v. Smith, 3 Dowl. Rep. 193. 1 Crompt. M. & R. 522. 5 Tyr. Rep. 141. 9 Leg. Obs. 270, 71. S. C. Hockley v. Sutton, 2 Dowl. Rep. 700. Mack v. Rust, 4 Dowl. Rep. 206. 10 Leg. Obs. 381. S. C.; and see Smith v. Smith, 5 Dowl. Rep. 84. 12 Leg. Obs.

46, 7. S. C.

^c Sharman v. Stevenson, 1 Gale, 74. 3 Dowl. Rep. 709. 2 Crompt. M. & R. 75. 5 Tyr. Rep. 564. S. C. Coates v. Stevens, 3 Dowl. Rep. 704. 1 Gale, 75. 2 Crompt. M. & R. 118. S. C.

^d Fallows v. Bird, 4 Dowl. Rep. 183. 2 Crompt. M. & R. 457. 1 Gale, 246. S. C.

^e Giles v. Hartis, 1 Ld. Raym. 254. 2 Salk. 622, 3. 3 Salk. 343. Carth. 413.

When an estoppel is pleaded, or replied.

If an *estoppel* be pleaded or replied, the party pleading or replying must rely upon it^a; and in concluding his plea or replication, the usual and best mode is to pray judgment if the opposite party, against the record, deed or acknowledgment, which is the ground of the *estoppel*, ought to be admitted to allege the matter stated in his declaration, or plea: though it seems, that if he were only to demand judgment generally, without saying any thing more, it would be deemed sufficient^b.

Pleading several matters.

At common law.

By stat. 4 Ann. c. 16.

Pleas in bar are commonly said to be *single* or *double*; or, in other words, the defendant may rely upon a single ground, or plead several matters in his defence: At common law, the defendant could only have pleaded a single matter to the whole declaration, which rigour often abridged the justice of his defence, and was doubtless one cause of perplexed inartificial pleading; the party endeavouring to crowd as much reasoning as he could into his plea, however intricate, repugnant and contradictory he made it by so doing^c; but even at common law, the defendant might have pleaded several matters to different parts of the declaration; as not guilty to part, and to other parts a justification, or release, &c.: and where there were several defendants, each of them might have pleaded separately, a single matter to the whole, or several matters to different parts of the declaration^d. By the statute, however, for the amendment of the law^e, "the defendant or tenant in any action or suit, or any plaintiff" "in *replevin*, in any court of record, may, with the leave of the same" "court, plead as many several matters thereto, as he shall think neces-

12 Mod. 152. Comb. 443. Holt, 556. S. C.; but see *Steward v. Coles*, Cro. Jac. 627. *contra*. Tidd *Prac.* 9 Ed. 662.

^a Co. Lit. 303. *b*. And for the general doctrine of *estoppel*, and the mode of pleading or replying it, see Com. Dig. tit. *Estoppel*, Bac. Abr. tit. *Pleas and Pleading*, I. 11. 1 Wms. Saund. 5 Ed. 216. (2.) 325. *a*. 2 Wms. Saund. 5 Ed. 418. (1.) 1 Chit. Pl. 4 Ed. 322, 3. 3 Chit. Pl. 1143, 4. Steph. Pl. 239, 40, 41. Tidd *Prac.* 9 Ed. 83. 140. 242. 448. 464. 562. 639. *Palmer v. Elkins*, 2 Str. 817. 2 Ld. Raym. 1550. S. C. *Shelley v. Wright*, Willes, 9. *Goodtitle d. Edwards v. Bailey*, Cowp. 597. *Hosier v. Searle*, 2 Bos. &

P. 299. *Outram v. Morewood*, 3 East, 346. *Harrison v. Wardle*, 5 Barn. & Ad. 146. 2 Nev. & M. 703. S. C. *Lainson v. Tremere*, 3 Nev. & M. 603. *Bowman v. Taylor*, 4 Nev. & M. 264. 2 Ad. & E. 278. S. C. *Bowman v. Rostron*, 4 Nev. & M. 552. 2 Ad. & E. 296. S. C.

^b *Shelley v. Wright*, Willes, 13. ^c 2 Eunom. 141; and see 1 Chit. Pl. 4 Ed. 208. 456. 477. Steph. Pl. 239, 90.

^d Co. Lit. 303. *a*.; and see Tidd *Prac.* 9 Ed. 654.

^e 4 Ann. c. 16. § 4, 5.

"sary for his defence: Provided nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause, for the plaintiff or demandant, costs shall be also given in like manner; unless the judge who tried the said issue, shall certify that the said defendant or tenant, or plaintiff in *replevin*, had a probable cause to plead such matter, which upon the said issue shall be found against him: Provided also, that nothing in this act shall extend to any writ, declaration, or suit of appeal of felony, &c. or to any writ, bill, action, or information upon any penal statute."

In the construction of this statute, which was considered as a remedial law ^a, the defendant, with the exceptions before mentioned, was formerly allowed to plead as many different matters as he thought necessary for his defence, though they might appear at first view to be contradictory or inconsistent; as *non assumpsit* and the statute of limitations ^b; or, as to part of the money demanded, that it was paid in the prosecution of illegal bargains ^c; or *non est factum* and the statute of gaming, or usury ^d; or, in *trespass*, not guilty and a justification ^e, accord and satisfaction, or tender of amends ^f, &c. So, he might plead *non assumpsit* and infancy, or a release ^g, or not guilty and *liberum tenementum* ^h; though as infancy might have been given in evidence on *non assumpsit*, and *liberum tenementum* upon not guilty, the pleading of these matters specially seems to have been unnecessary: and the plaintiff in *replevin* might have pleaded in bar to the defendant's avowry or cognizance, that he did not hold as tenant, and no rent in arrear, with a plea of infancy ⁱ. But the defendant was not formerly allowed to plead any pleas that were manifestly inconsistent, such as *non assumpsit* ^k, or *non est factum* ^l, to the whole

Several pleas, when formerly allowed, and when not.

Inconsistent pleas.

^a Steele v. Pindar, Barnes, 347, 8.

^b Jackson v. Warwick, Barnes, 361.

^c Triebner v. Duerr, 1 Scott, 103.
1 Bing. N. R. 266. 3 Dowl. Rep. 133.
S. C.

^d Lechmere v. Rice, 2 Bos. & P. 12;
and see M'Connell v. Hector, *id.* 549.

^e Harman v. Dunn, Barnes, 355.
Tayler v. Wittall, *id.* *ib.* Harison v. Speight, *id.* 356. Smith v. Lodge, *id.* *ib.* Thomas v. Eamonsen, *id.* 365. M'Crandle v. Barwise, 4 Moore & P. 120. 6 Bing. 429. 432. S. C.

^f Gerring v. Manning, Barnes, 366.

Martin v. Kesterton, 2 Blac. Rep. 1093.

^g Wright v. Gregory, T. 32 Geo. III. C. P. Imp. C. P. 7 Ed. 251.

^h Stibbs v. Nives, (or Neeves,) Cas. Fr. C. P. 153. Barnes, 336. S. C.; and see Harison v. Speight, *id.* 366.

ⁱ Wilson v. Ames, 5 Taunt. 340. 1 Marsh. 74. S. C.

^k Kaye v. Patch, T. 27 Geo. III. K. B. Maclellan v. Howard, 4 Durnf. & E. 194. Dougal (or Dowgal) v. Bowman, 2 Blac. Rep. 723. 3 Wils. 145. S. C.

^l Jenkins v. Edwards, 5 Durnf. & E. 97. Orgill v. Kemshead, 4 Taunt. 459.

declaration, and a *tender* as to part; for one of these pleas went to deny that the plaintiff ~~never~~ had any cause of action, and the other partially admitted it. So, the defendant was not allowed to plead a plea of alien enemy, with *non assumpsit*^a, a *tender*^b, or other inconsistent matter^c: nor several matters which required different trials, as in *dower*, *ne unques accouple en loyal matrimonie* and a mortgage, or *ne unques seisie que dower*^d; for the first matter was triable by the bishop, and the others by a jury; and if the former were found against the defendant, the judge could not certify that he had a probable cause of pleading it^e.

In C. P.

In the Common Pleas, the defendant was not formerly allowed to plead in *assumpsit*, *non assumpsit* and infancy^f, the stock jobbing act^g, or a release^h, or set offⁱ; in *debt* on bond, *non est factum* and *solvit ad* or *post diem*^k; in *debt* for rent, *nil debet* and *nil habuit in tenementis*^l; in *trover*, not guilty and the bankruptcy of the plaintiff^m; or, in *trespass*, not guilty and a justificationⁿ, or a release of a particular trespass^o. And the court would not more recently allow the defendant to plead *non est factum* in an action on a deed made beyond seas, where he relied, in some of his pleas, on matters of defence which necessarily imported the execution of the deed^p. So, to a declaration on a life policy, the court would not allow the defendant to plead first, the general issue; secondly, a fraudulent misrepresentation as to the state of health of the party whose life was insured; and lastly, that the policy was not under seal^q. So, in an action by a reversioner against assignees of a bankrupt, for several breaches of covenant in a lease, the court refused to permit the defendants to plead *non est factum*, and also that the premises did not come to them by assignment^r. And the court intimated, that where

^a *Feron v. Ladd*, 2 Blac. Rep. 1326.

Palmer v. Henderson, E. 21 Geo. III.

C. P. *Angerstein v. Vaughan*, 1 Bos. &

P. 222. (a.) *Thyatt v. Young*, 2 Bos. &

P. 72. *Shombeck v. De La Cour*, 10 East, 327.

^b *Shombeck v. De La Cour*, 10 East, 326.

^c *Truckenbrodt v. Payne*, 12 East, 206.

^d *Anon.* Com. Rep. 148. *Anderson v.*

Anderson, 2 Blac. Rep. 1157. *Hillier v.*

Fletcher, *id.* 1207; but see *Robins v.*

Crutchley, 2 Wils. 118. *semb. contra.*

^e *Tidd Prac.* 9 Ed. 655.

^f *Anon.* Barnes, 363.

^g *Shaw v. Everett*, 1 Bos. & P. 222.

Rosset v. King, 1 Moore & P. 145.

^h *Marshall (or Marshall) v. Lawrence*, Cas. Pr. C. P. 154. Barnes, 333. S. C.

ⁱ *Jarratt v. Robinson*, Barnes, 333.

^k *Anon. id.* 363. *Fox v. Chandler*, 2 Blac. Rep. 905. *Arnold v. Baas*, *id.* 998.

^l *Marshall (or Marshall) v. Lawrence*, Cas. Pr. C. P. 154. Barnes, 333. S. C.

^m *Herbert v. Flower*, Barnes, 360.

ⁿ *Barnet (or Barnett) v. Greaves*, Cas. Pr. C. P. 154. Barnes, 339. S. C.

^o *Prinnel v. Preston*, Barnes, 351.

^p *Laughton v. Ritchie*, 3 Taunt. 385; and see *Tidd Prac.* 9 Ed. 655, 6.

^q *Weld v. Foster*, 12 Moore, 61.

^r *Whale v. Lenny*, 2 Moore & P. 19. 5 Bing. 12. S. C.

a title was deduced through a number of successive links, they would only allow the defendant to traverse the material allegation, and not to take issue on every distinct averment of fact immaterial to the decision of the cause ^a. So, in an action of *covenant* against an executor, on an indenture of lease, the court refused to permit the defendant to plead, in addition to the pleas of *plene administravit*, and *plene administravit* before he had notice of the indenture, pleas of *plene administravit* before he had notice of the breach of covenant, and payment to the residuary legatees before notice of the indenture ^b. So, in *scire facias* on a judgment, the defendant having moved to plead several matters, viz: first, payment; secondly, that the judgment was fraudulent; and thirdly, that it was on a warrant of attorney fraudulently obtained; the court refused to allow the three pleas to be pleaded, and put the defendant to his election ^c. So, in *quare impedit*, where the plaintiff in his declaration set out his title to an advowson, commencing in 1603, and which was principally founded on a deed of 1672; and the defendants claimed under a subsequent deed, executed by the same party in 1692, and traversed every material allegation in the declaration, in *forty-three* several pleas; the court of Common Pleas, after nonsuit and a rule absolute for a new trial, rescinded the original rule to plead several matters, and ordered *twenty-two* pleas to be struck out, and eventually confined the defendant to *two* only, which went to dispute the validity of the deed of 1672 ^d. And in general it seems, that the court of Common Pleas would not have allowed inconsistent pleas to be pleaded together, unless at the time of the application for leave to plead several matters, an *affidavit* had been made that such pleas were necessary for the justice of the case ^e. So, in the Exchequer, where *nil debet* and several special pleas were pleaded to *debt* on a foreign judgment, the plea of *nil debet* was ordered to be struck out ^f.

The statute for the amendment of the law ^g, however, does not extend to any action or information upon a *penal* statute ^h; nor to an action in an *inferior* court not of record ⁱ. And as the *king* is not

On penal statute, &c.

^a *Whale v. Lenny*, 5 Bing. 12, 13.

^b *Davis v. Blackwell*, 3 Leg. Obs. 149.
and see *Same v. Same*, 2 Moore & S. 7.
9 Bing. 5. S. C.

^c *Shaw v. Ld. Alvanley*, 2 Bing. 325.
9 Moore, 694. S. C.

^d *Gully v. Bp. of Exeter*, 2 Moore & P. 105. 4 Bing. 525. 5 Bing. 42. S. C.

^e *Shaw v. Russell*, 11 Moore, 540.

Anon. 3 Bing. 635. S. C.; and see
Smith v. Backwell, 1 Moore & P. 345.

^f *Aliven v. Furnival*, 1 Dowl. Rep. 690.

^g 4 Ann c. 16. § 7.

^h *Ante*, 401; and see *Tidd Prac.* 9 Ed. 655. and the authorities there cited.

ⁱ *Chitty v. Dendy*, 1 Har. & W. 169.
4 Nev. & M. 842. 3 Ad. & E. 319. S. C.

bound by this statute ^a, the defendant cannot plead double in an information of intrusion ^b; in *quare impedit*, where the king is a party ^c; or in *scire facias*, for a bond debt to the king ^d: nor could he have pleaded double to an information in the nature of a *quo warranto* ^e, till the statute 32 Geo. III. c. 58 ^f; nor in *prohibition*, till the statute 1 W. IV. c. 21 ^g. but he is now, by these statutes, allowed to do so in the two latter cases.

By statutory rule.

At length, by one of the late statutory rules of pleading ^h, reciting that by the mode of pleading thereafter prescribed, the several disputed facts material to the merits of the case, would, before the trial, be brought to the notice of the respective parties more distinctly than theretofore, and that by the act of 3 & 4 W. IV. c. 42. § 23, the powers of amendment at the trial, in cases of variance, in particulars not material to the merits of the case, were greatly enlarged; it was declared that "several pleas, or avowries or cognizances, should not be allowed, unless a distinct ground of answer or defence was intended to be established in respect of each: and that pleas, avowries and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in *replevin* are within the rule,) are not to be allowed. *Ex. gr.* Pleas of *solvit ad diem*, and of *solvit post diem*, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed: But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed. Pleas of an agreement to accept the security of *A. B.* in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct, and to be allowed: But pleas of an agreement to accept the security of a *third* person, in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same

^a Regina v. Bewdley, 1 P. Wms. 220.

Rex v. Caldwell, Forrest, 57.

^b Attorney-General v. Allgood, Parker, 1. Rex v. Sir C. W. Phillips, H. 20 Geo. II. Parker, 10.

^c Rex v. Archbishop of York, Willes, 583. Barnes, 353. S. C.

^d Rex v. Caldwell, Forrest, 57; but see Attorney-General v. Snow, Bunb. 96. Rex v. Huggins, Com. Rep. 422. *semb. contra*; which cases, however, were in effect overruled by the case of the Attorney-General v. Allgood, Parker, 1.

^e Regina v. Bewdley, 1 P. Wms. 220.

Attorney-General v. Allgood, Parker, 1. ^o

^f For this statute, and the decisions thereon, see Tidd Prac. 9 Ed. 656, 7. Rex v. Brooks, 8 Barn. & C. 321. 2 Man. & R. 389. S. C. Rex v. Langhorn, 2 Nev. & M. 618.

^g Post, Chap. XLVI. Hall v. Maule, 5 Nev. & M. 455. 1 Har. & W. 583. S. C.

^h R. Pl. Gen. H. 4 W. IV. reg. 5. 5 Barn. & Ad. Append. ii. 10 Bing. 464. 2 Crompt. & M. 12.

security, are not distinct ; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed. In *trespass quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there, pleas of right of *way*, of common of *pasture*, of common of *turbary*, and of common of *estovers*, are distinct, and are to be allowed ; but pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed. So, pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed. Avowries for distress for rent, and for distress for *damage feasant*, are to be allowed ; but avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed. The examples in this and other places specified, are given as some instances only of the application of the rules to which they relate ; but the principles contained in the rules, are not to be considered as restricted by the examples specified."

To give effect to this rule, it is declared by an auxiliary one ^a, that "where more than one plea, avowry or cognizance, shall have been used, in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the pleas, avowries or cognizances, are founded on the same ground of answer or defence, for an order that all the pleas, avowries or cognizances, introduced in violation of the rule, be struck out at the cost of the party pleading ; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shewn, that some distinct ground of answer or defence is intended to be established in respect of each of such pleas, avowries or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied ; and shall also specify the pleas, avowries or cognizances, mentioned in such application, which shall be allowed."

Consequences of violating the foregoing rule.

Upon the trial, it is declared by another statutory rule ^b, that "where there is more than one plea, avowry or cognizance, upon the record, and the party pleading fails to establish a distinct ground of answer or defence in respect of each plea, avowry or cognizance, a verdict and judgment shall pass against him, upon each plea, avowry or cognizance, which he shall have so failed to establish ; and he shall

Upon the trial.

^a R. Pl. Gen. H. 4 W. IV. reg. 6. 5
Barn. & Ad. Append. iv. 10 Bing. 466.
2 Crompt. & M. 15.

^b R. Pl. Gen. H. 4 W. IV. reg. 7. 5
Barn. & Ad. Append. iv. v. 10 Bing. 466,
7. 2 Crompt. & M. 16.

be liable to the other party for all the costs occasioned by such plea, avowry or cognizance, including those of the evidence as well as those of the pleadings: and further, in all cases in which application to a judge has been made under the preceding rule, and any plea, avowry or cognizance allowed as aforesaid, upon the ground that some distinct ground of answer or defence was *bond fide* intended to be established in respect of each plea, avowry or cognizance so allowed, if the court or judge, before whom the trial is had, shall be of opinion that no such distinct ground of answer or defence was *bond fide* intended to be established in respect of each plea, avowry or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any plea, avowry or cognizance, with respect to which the judge shall so certify." ^a

Decisions thereon, where several pleas have been allowed.

Since the making of this rule, the defendant in an action for goods sold and delivered, and for money paid to his use, was allowed to plead the general issue, and, as to part of the money demanded, that it was paid in the prosecution of illegal bargains ^b. And although it was objected that these were inconsistent pleas, yet, as was observed by Lord Chief Justice *Tindal*, 'the late rules for the regulation of pleading nowhere state that pleas that are inconsistent with each other shall not be allowed: On the contrary, amongst the examples of pleas that may be pleaded together, we find pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed. These, and many others that might be referred to,' he observed, 'are instances of pleas that cannot all be true, and in that sense are inconsistent: It was not intended that the defendant should be shut out from any fair and *bond fide* ground of defence: Though, where pleas that are manifestly inconsistent with each other, appear to be vexatiously pleaded, and for the purpose of occasioning inconvenience and expense to the plaintiff, the court will not allow them.' ^c And Mr. Justice *Bosanquet* remarked, that 'the word *inconsistent* was studiously avoided in framing the new rules, because it was felt that two or more pleas might be inconsistent, and yet contain substantially different defences; the object had in view being to prevent the same defence being pleaded in different forms: In that case, the pleas presented two defences quite distinct, the one matter of fact,

^a For the origin of these rules, see 2 Rep. C. L. Com. 42.

^b *Triebner v. Duerr*, 1 Scott, 102. 1 Bing. N. R. 266. 3 Dowl. Rep. 133. S. C.; and see *Hart v. Bell*, 1 Hodges, 6. Wil-

kinson v. Small, 3 Dowl. Rep. 564. 1 Har. & W. 214. 10 Leg. Obs. 109. S. C. per Williams, J.

^c *Triebner v. Duerr*, 1 Scott, 103, 4.

the other of law.'^a In a subsequent case^b, the court allowed the assignees of a bankrupt to plead, in *covenant* on a lease, first, that the lessee's interest did not pass to them; and secondly, that they renounced the term, in time to be discharged from the performance of the covenants. So, in an action of *debt* on simple contract, the defendant was allowed to plead first, as to a particular sum, his bankruptcy; secondly, as to another sum, payment; thirdly, as to a third sum, accord and satisfaction; and fourthly, as to the whole demand except a particular sum, the plea of *nunquam indebitatus* ^c. So, in an action by the assignees of a bankrupt, the court will allow the bankruptcy to be put in issue if doubtful, together with a plea of mutual credit, and payment of money into court^d. So, in *trover* by the assignee of a bankrupt, the defendant may it seems plead first, not guilty, to put the plaintiff upon proof of the conversion; secondly, that the plaintiff is not assignee of the bankrupt; and thirdly, that the plaintiff was not lawfully possessed of the goods, as of his property as such assignee^e. So, in an action of *trover* for wool, the defendant was allowed to plead, first, the plea of not guilty; secondly, a lien by custom; thirdly, a lien by special agreement; fourthly, a lien by custom, stating that the wool was deposited by one having a *prima facie* title to it; and fifthly, a lien by custom, with a statement that the wool was deposited with the defendant by the plaintiff's agent^f. And the court will not set aside one of several pleas, where a rule to plead several matters has been consented to by the plaintiff^g.

On the other hand, the court will not allow special matter to be pleaded, where it may be given in evidence under the general issue; as a special contract in *assumpsit*, to a declaration in the common form, for goods bargained and sold^h. So, where the defendant moved for leave to plead several matters, *viz.* 1st, *non assumpsit*; 2dly, payment as to part; 3dly, as to part, that the goods were warranted like the sample; 4thly, as to part, that the goods were warranted to be of good merchantable quality; and 5thly, that they

When not
allowed.

^a *Triebner v. Duerr*, 1 Scott, 104.

^b *Thompson v. Bradbury*, 1 Bing. N. R. 326. 1 Scott, 279. 3 Dowl. Rep. 147. S. C.

^c *Hart v. Bell*, 1 Hodges, 6.

^d *Atkinson v. Duckham*, 4 Dowl. Rep. 327. 11 Leg. Obs. 188. S. C.

^e *Scott v. Thomas*, 6 Car. & P. 611. *per Parke*, B.

^f *Leuckhart v. Cooper*, 1 Hodges, 16.

1 Bing. N. R. 509. 1 Scott, 481. 3 Dowl. Rep. 415. 9 Leg. Obs. 476, 7. S. C. Same *v. Same*, 3 Bing. N. R. 99.

^g *Howen v. Carr*, 5 Dowl. Rep. 305. 13 Leg. Obs. 111. S. C.

^h *Gardner v. Alexander*, 3 Dowl. Rep. 146. 1 Scott, 281. 9 Leg. Obs. 237. S. C.

were warranted to be one ton weight of black-lead, the first and fourth pleas were disallowed ^a; for, as was observed by the chief justice, 'there was no pretence for the first plea: if part of the price had been paid, as alleged in the second, the defendant was precluded from saying there was no contract, which is by the new rules the limit of *non assumpsit*: the third and fourth pleas were also incompatible; if the defendant stood upon the express warranty, that the goods were like the sample, he ought not also to be allowed to set up a warranty in law that the goods were merchantable.' So, in an action on an attorney's bill, where the defendant, after having suffered judgment to go by default, which was set aside on an *affidavit* of merits and payment of costs, pleaded that no signed bill had been delivered, and afterwards added two pleas of *non assumpsit*, and that the plaintiff had not taken out his certificate; and the plaintiff, on application to a judge at chambers, obtained an order confining the defendant to the plea of the general issue, the court held that this order was proper, it appearing that the defendant had had the bill taxed ^b. So, in an action on the *case* for maliciously, and without any reasonable or probable cause, indicting the plaintiff for a conspiracy, the court would not permit the defendant to plead that he had probable cause to indict, together with the plea of not guilty ^c. So, in *trespass* for breaking and entering the plaintiff's closes, and digging and making trenches, &c. the court would not give the defendant leave to plead, first, a justification of the trespasses, under a custom for all stanners and tanners in the stannaries to make trenches in any lands, for conveying water to any stannary worked by them, for the better working of the same; and secondly, the like plea, but alleging the custom to be, on making reasonable compensation for the injuries done ^d. And where a defendant may, by statute, give matter of justification in evidence under the general issue, as in *trespass* for breaking and entering the plaintiff's dwelling-house, and seizing and detaining his goods, the defendant will not be permitted to plead the general issue, and also a special plea of justification, that he entered the house as landlord, to seize the goods on a distress for rent ^e.

^a Steele v. Sterry, 1 Scott, 101. 3 Dowl. Rep. 133. S. C.

^b Biggs v. Maxwell, 3 Dowl. Rep. 497.

^c Cotton v. Brown, 4 Nev. & M. 831. 3 Ad. & E. 312. 1 Har. & W. 419. S. C.

^d Bastard v. Smith, M. 7 W. IV. K. B.

^e Neale v. M'Kenzie, 1 Cramp. M. & R. 61. 4 Tyr. Rep. 670. 2 Dowl. Rep. 702. S. C.; but see Twigg v. Potts, 1 Cramp. M. & R. 89. Hooker v. Nye, *id.* 258. 4 Tyr. Rep. 777. S. C. where such a justification was pleaded specially.

The motion for leave to plead several matters was formerly a mere motion of course in the King's Bench, which only required counsel's signature; and the motion paper being delivered to the clerk of the rules, he drew up a rule absolute thereon: In the Common Pleas, the rule to plead several matters was drawn up by the secondaries; and formerly they were allowed in certain cases to draw it up, as a matter of course, on a brief or motion paper signed by a serjeant; but in other cases there must have been a rule to shew cause, why the defendant should not have leave to plead the several matters intended to be pleaded; which rule was drawn up by the secondaries, on a brief or motion paper signed by a serjeant^a. But now, by a general rule of all the courts^b, it is ordered that "no rule to shew cause or motion shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a judge's order^c, to be made upon a summons^c, accompanied by a short abstract or statement of the intended pleas, avowries or cognizances^c: Provided, that no summons or order shall be necessary in the following cases, that is to say, where the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof."

Leave to plead several matters, how formerly obtained.

How now obtained.

In the King's Bench, if several pleas were filed to the whole or part of a declaration, without a rule to plead several matters being drawn up, or instructions given for it to the clerk of the rules, they were formerly considered as a nullity, and the plaintiff might have signed judgment^d: In the Common Pleas, it seems that the practice in such case was for the plaintiff to apply to the court, to strike out one of them^e. But now, by a general rule of all the courts^f, "if a party plead several pleas, avowries, or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment."

Consequence of pleading several matters, without leave.

^a Tidd *Prac.* 9 Ed. 484, 5, 6. 488. 657, 8.

H. 26 Geo. III. K. B.

^b R. T. 1 W. IV. reg. IX. 2 Barn. & Ad. 789. 7 Bing. 784, 5. 1 Crompt. & J. 472.

^c Griffiths v. Eyles, 1 Bos. & P. 415; and see Tidd *Prac.* 9 Ed. 566, 7. 658.

^e Append. to Tidd *Sup.* 1832. p. 114.

^f R. H. 2 W. IV. reg. I. § 34. 3 Barn. & Ad. 375. 8 Bing. 293. 2 Crompt. & J. 177, 8; and see Hockley v. Sutton, 2 Dowl. Rep. 700.

^d Per Buller, J. in Bedford & Gatfield,

Leave of court need not be stated in second or other plea, or avowry.

When several pleas or avowries were pleaded by leave of the court, it was formerly necessary to state that they were so pleaded, in the beginning of the second or other subsequent plea or avowry : But, by a general rule of all the courts ^a, "it shall not be necessary to state in a second or other plea or avowry, that it is pleaded by leave of the court, or according to the form of the statute, or to that effect."

Signing pleas, &c. in K. B.

In the King's Bench, there are certain common pleas which need not be signed by counsel ; such as *plene administravit* ^b, bankruptcy in the defendant ^c, a special *non est factum*, *solvit ad diem* ^d, *comperuit ad diem* to a bail bond ^e, or *nul tiel record* to an action on a judgment or recognizance, and in *trespass*, *son assault demesne*, *liberum tenementum*, or not guilty to a new assignment. But, except in the foregoing cases, it was a rule in that court, that all special pleas must be signed by counsel ^f. In the Common Pleas, the following pleas did not formerly require a serjeant's hand, viz. *comperuit ad diem*, *son assault demesne*, *plene administravit*, *riens per descent*, *ne unques executor* or *administrator*, *nul tiel record*, *per minas*, *per duress*, *infra ætatem*, and *solvit ad diem* ^g : but it is now usual to sign all these pleas, except *comperuit ad diem*, *nul tiel record* ^h, and *solvit ad diem* ⁱ, which are considered as general issues : and it has been determined, that a plea of *non assumpsit infra sex annos* must be signed ^k. So, all double pleas were formerly required to be signed by a serjeant in the Common Pleas ^l ; and if a plea, which ought to be signed, be delivered or filed without a serjeant's or counsel's hand, the plaintiff may sign judgment, as if no plea had been pleaded ^m. And although a defendant conducted his cause in person, yet if he filed a special plea, it

¹In C. P.

^a R. Pl. Gen. 4 W. IV. reg. 11. 5 Barn. & Ad. Append. v. 10 Bing. 467. 2 Crompt. & M. 17.

^b Read v. Speer, (or Spurr,) 5 Dowl. Rep. 330. 2 Meeson & W. 76. S. C.

^c Leigh v. Monteiro, 6 Durnf. & E. 496. Henderson v. Sansum, 1 Chit. R. 225.

^d Lockhart v. Mackreth, 5 Durnf. & E. 661.

^e Rowzell v. Cox, 2 Barn. & Ald. 392. 1 Chit. R. 211. S. C.

^f R. E. 18 Car. II. K. B. Grant v. —, 2 Chit. R. 319. 1 Car. & P. 95.

(a.) And for the origin and reason of the signature of pleas by counsel, see Simpson

v. Neale, 2 Wils. 74. Barnes, 365. S. C.

^g Upton v. Pullyn (or Palleine) Cas. Pr. C. P. 41. Pr. Reg. 282, 3. S. C. Simpson v. Neale, Barnes, 365. 2 Wils. 74. S. C.

^h Hubert v. Weymouth, 2 Blac. Rep. 816 ; but see Simpson v. Neale, 2 Wils. 74. Barnes, 365. S. C. contra.

ⁱ Lockhart v. Mackreth, 5 Durnf. & E. 663 ; and see Imp. C. P. 6 Ed. 239.

^k Upton v. Pullyn, Cas. Pr. C. P. 41.

^l Imp. C. P. 6 Ed. 241.

^m Anon. Pr. reg. 282 ; and see Macher v. Billing, 4 Tyr. Rep. 812. 1 Crompt. M. & R. 577. 3 Dowl. Rep. 246. S. C.

was a nullity, unless signed by a serjeant or counsel^a. The replication, and subsequent pleadings, should also be signed by counsel, unless they conclude to the country.

In the King's Bench, when the plea or replication, &c. concluded to the country, it was not necessary that it should be signed by counsel; and, in that court, a plea of bankruptcy in the defendant, which concluded to the country, need not have been so signed^b; although it must have been signed by a serjeant in the Common Pleas^c: and in the latter court it was holden, that a tender of an issue in fact must be signed by a serjeant, but a joinder in issue need not^d. By a general rule, however, of all the courts^e, "it shall not be necessary that any pleadings, which conclude to the country, be signed by counsel." And the exclusive privilege of serjeants being now abolished^f, there is no distinction as to signing pleas, &c. in any of the courts, between serjeants and counsel.

In the King's Bench, the general issue was formerly delivered to the plaintiff's attorney, or entered in the general issue book kept by the clerk of the judgments^g. There were also certain common pleas in that court, which must have been delivered to the plaintiff's attorney, and not entered in the general issue book, or filed in the office of the clerk of the papers; and if they were so entered or filed, the plaintiff was not bound to notice them, but might have signed judgment as for want of a plea^h: and all pleas and demurrers upon writs of error, *scire facias*, and *audita querela*, must also have been delivered in the King's Benchⁱ. But, except in the foregoing cases, it was a rule, that all special pleas must have been filed in the office of the clerk of the papers^k, who made copies of them for the plaintiff's attorney: and all double pleas must have been filed, and not merely delivered to the plaintiff's attorney, though two pleas were pleaded,

^a Anon. Pr. Reg. 282. Pitcher v. Martin, 3 Bos. & P. 171. Samuels v. Dunne, 3 Taunt. 386.

^b Leigh v. Monteiro, 6 Durnf. & E. 496. Henderson v. Sansum, 1 Chit. R. 225.

^c Pitcher v. Martin, 3 Bos. & P. 171.

^d Ellis v. Govey, 1 Bos. & P. 469. Pitcher v. Martin, 3 Bos. & P. 171; and see Tidd Prac. 9 Ed. 671, 2. 693.

^e R. H. 2 W. IV. reg. I. § 107. 3 Barn. & Ad. 390. 8 Bing. 305. 2 Crompt. & J. 198; and see Thynne v. Woodman, 2 Tyr. Rep. 494. 3 Rep. C. L. Com.

^f Ante, 34.

^g R. T. 5 & 6 Geo. II. (b.) K. B. Davison v. Moreton, 1 Chit. Rep. 715.

^h Lockhart v. Mackreth, 5 Durnf. & E. 661. Rowsell v. Cox, 2 Barn. & Ald. 392. 1 Chit. Rep. 211. S. C. Henderson v. Sansum, *id.* 225. S. P. Fry v. Champneys, 2 Chit. Rep. 295. Kent v. Monk, *id. ib.*

ⁱ R. T. 12 W. III. (a.) K. B.

^k R. T. 2 Jac. I. reg. I. R. T. 16 Car. II. R. M. 2 W. & M. K. B.

which separately need only have been delivered ^a. In the Common Pleas, all pleas, whether general or special, were either delivered to the plaintiff's attorney, or filed with the prothonotaries. But now, by a general rule of all the courts ^b, "no pleading subsequent to the declaration, shall in any case be *filed* with any officer of the court, but the same shall always be *delivered* between the parties." This rule does not apply to actions of *ejectment*, in which the plea of the general issue is still left at a judge's chambers in the King's Bench, or the prothonotaries' office in the Common Pleas, according to the old practice ^c.

Adding special
plea.

After the defendant has pleaded, he may obtain leave from the court or a judge to add a special plea, if necessary for his defence: and this leave was granted in one case, after two terms had elapsed since the first pleas were pleaded ^d; and in another, after issue joined twelve months before ^e: And the court permitted the defendant to add a special plea, where it was doubtful whether a statutable objection could be taken under the plea of *non assumpsit* ^f. But where, in an action of *covenant* on a charterparty, the defendant pleaded several special pleas, to some of which the plaintiff demurred, and after argument obtained judgment, the court held that the defendant could not afterwards file additional pleas, although it was sworn that facts had come to his knowledge material for his defence, since the argument on demurrer, and with which facts he was then unacquainted ^g. And a defendant, in an action on a banker's check, having pleaded a plea admitting the making of the check, the court would not permit him subsequently to add a plea, that it was not made pursuant to the provisions of the stamp act ^h.

Amending pleas,
&c.

At common law, when the pleadings were *ore tenus* at the bar of the court, if any error was perceived in them, it was presently amended ⁱ. Afterwards, when the pleadings came to be in paper, it was thought but reasonable that the parties should have the like indulgence ^k. And hence it is now settled ^l, that whilst the pleadings

^a Harrison v. Franco, 2 East, 225; and see Tidd Prac. 9 Ed. 671, 2.

^b R. Pr. H. 4 W. IV. reg. 1. 5 Barn. & Ad. Append. xiv. 10 Bing. 453. 2 Cromp. & M. 1.

^c Doe d. Williams v. Williams, 4 Nev. & M. 259. 2 Ad. & E. 381. S. C.

^d Waters v. Bovill, 1 Wils. 223.

^e Brown v. James, Barnes, 362; and see Huber v. Steiner, 4 Moore & S. 328. 2 Dowl. Rep. 781. S. C. Tidd Prac. 9 Ed. 673, 4.

^f Smith v. Dixon, 4 Dowl. Rep. 571. 1

Har. & W. 668. 11 Leg. Obs. 388. S. C.

^g Munnings v. Lennox, 12 Moore, 133; and see Farebrother v. Woraley, 1 Price, N. R. 70. 1 Tyr. Rep. 437. 1 Cromp. & J. 563. S. C.

^h Jenkins v. Creech, 5 Dowl. Rep. 293. M^c Dowall v. Lyster, 2 Meeson & W. 52. Anon. 13 Leg. Obs. 143.

ⁱ Rush v. Seymour, 10 Mod. 88. Garner v. Anderson, 1 Str. 11.

^k Anon. 2 Salk. 520. Gilb. C. P. 114, 15.

^l Anon. 1 Salk. 47. Anon. 3 Salk. 31.

are in paper, and before they are entered of record, the court or a judge will amend the plea^a, or replication^b, &c. in form or in substance, on proper and equitable terms. In the Common Pleas, the court allowed several avowries in *replevin* to be amended, by altering the name and description of the *locus in quo*, and stating the holding to have been for a year, instead of half a year, and also by adding new avowries, varying the amount of the rent, although issue had been joined, and notice of trial given and countermanded, and more than two terms had elapsed previously to the application for the amendment^c: And a plea was allowed to be amended in the Exchequer, after the plaintiff had replied, and the cause was in the paper, under special circumstances^d.

In the King's Bench, the defendant was formerly allowed to waive the general issue, if it were not entered, and plead specially, without leave of the court, in *four days*^e; or, as it should seem, before the adjournment day of the term^f, or within the first *five* days of the ensuing term^g: But, by a general rule of all the courts^h, "the defendant shall not be at liberty to waive his plea, without leave of the court or a judge." By the ancient practice of the King's Bench, if a special plea had been put in, and the book made up and delivered to the defendant's attorney, he might, if not under terms of pleading issuably, have struck out the special plea or demurrer, and returned it with a general issue, or general demurrerⁱ. To prevent this, if the defendant pleaded a dilatory or frivolous plea, the court in term time, or a judge in vacation^k, would have ordered him to abide by it, or plead some other plea peremptorily on the morrow; or, if it were towards the end of the term, that the plaintiff might have sufficient time to give notice of trial, the court would have ordered the defendant, if he would not abide by this plea, to plead another *instantly*, provided always that the time allowed by the common rule to plead were expired^l: and the practice was the same, with regard to frivolous demurrers^l. But now, since the rule of *Hil. 2 W. IV. reg. L. § 46.* by which the defendant is

Waiving general issue, in K. B.

Rule or order to abide by special plea, or demurrer.

Abolished.

^a *Waters v. Bovill*, 1 Wils. 223.

^b *Low v. Newland*, *id.* 76.

^c *Prior v. Duke of Buckingham*, 8 Moore, 584.

^d *Jones v. Roberts*, 2 Dowl. Rep. 698.

^e *West (or Watts) v. West*, 1 Ld. Rayn. 674. 3 Salk. 211. 274. S. C.

^f *Griffith v. Williams*, Say. Rep. 87.

^g *Prax. utr. Banci*, 37. R. T. 5 & 6 Geo. II. (b.) K. B.

^h R. H. 2 W. IV. reg. 1. § 46. 3

Barn. & Ad. 380. 8 Bing. 294. 2 Crompt. & J. 181.

ⁱ *Pierce v. Blake*, 2 Salk. 515. R. T. 5 & 6 Geo. II. b. K. B. *Weld v. Nedham*, 1 Wils. 29.

^k *Foster v. Snow*, 2 Bur. 781. 2 Ken. 483. S. C.

^l *Pierce v. Blake*, 2 Salk. 515. R. T. 5 & 6 Geo. II. b. K. B.; and see *Nagee v. Dean*, 2 Leg. Obs. 44. *per Taunton, J.*

not at liberty to waive his plea without leave of the court or a judge, the former practice of obtaining a rule or order for the defendant to abide by his plea is abolished^a. In a late case, however, after a bad plea of "no consideration," to a declaration on a bill of exchange, by which the plaintiff had been delayed the long vacation, the court, under special circumstances, allowed the defendant to withdraw his plea, and plead *de novo*, and have an inspection of the bill, without an *affidavit* of merits^b.

Striking out
pleas.

When there are two pleas to the whole action, upon one of which issue is joined to the country, and upon the other judgment is given for the defendant upon demurrer, the court will allow the defendant to strike out the general issue^c. And where, in an action on a bill of exchange, by indorsee against acceptor, the defendant, having obtained an inspection of the bill, pleaded pleas denying the acceptance, the drawing, and the indorsement, and also a plea founded on the 3 & 4 W. IV. c. 97. § 17. that the bill was written on paper improperly stamped with an old die, the court struck out the last plea^d. When the defendant pleads a release fraudulently obtained from the nominal plaintiff, to the prejudice of the party really interested, and for whose benefit the action is brought, or from one of several plaintiffs to the prejudice of the rest, the court on motion will set aside the plea, and order the release to be delivered up to be cancelled^e. And where one of several plaintiffs, assignees of a bankrupt, released the cause of action, and the release was pleaded, the court set aside the plea; suspicion being thrown on the defendant's conduct in the transaction, and the co-plaintiffs indemnifying the plaintiff who had given the release, against costs^f. But except a very strong case of fraud be made out, the court will not control the legal power of a co-plaintiff to release the action^g. And in an action of *covenant*, where the defendant pleaded payment to the plaintiff on the record, who was only the nominal party to the suit, there being no fraud alleged, the court would not order the plea to be taken off the file^h. So, they would not allow a plea to be set aside by *affidavit* on motion, on

Setting aside
pleas.

^a 1 Chit. Archb. 2 Ed. 254, 5.

^b *Papleaf v. Codrington*, 4 Dowl. Rep. 497.

^c *Young v. Beck*, 3 Dowl. Rep. 804. 10 Leg. Obs. 349. S. C.; and see *Tidd Prac.* 9 Ed. 673, 4.

^d *Dawson v. Macdonald*, 2 Meeson & W. 26. *Anie*, 343. 412.

^e *Tidd Prac.* 9 Ed. 677, 8, and the

cases there referred to.

^f *Johnson v. Holdsworth*, 4 Dowl. Rep. 63. 10 Leg. Obs. 475. S. C.

^g *Jones v. Herbert*, 7 Taunt. 421; and see *Arton v. Booth*, 4 Moore, 192. *Furnival v. Weston*, 7 Moore, 356.

^h *Gibson v. Winter*, 1 Har. & W. 436.

which an issue could be taken ^a. And although a plea may be insufficient in point of law, the court will not set it aside, and suffer judgment to be signed as for want of a plea ^b. So, if a plea was a good plea when pleaded, but by the occurrence of subsequent matter becomes no answer to the action, the court will not on that account direct it to be taken off the file: Therefore where, to a *scire facias* to revive a judgment, the defendant pleaded the pendency of a writ of error, the court refused to permit that plea to be taken off the file, on the writ of error being quashed ^c.

^a *La Forest v. Langan*, 4 Dowl. Rep. 1 Har. & W. 642. 11 Leg. Obs. 324.
642. 1 Hodges, 410. 11 Leg. Obs. 310. S. C.

^c *Snook v. Maddox*, 1 Har. & W. 584.

^b *Cowper v. Jones*, 4 Dowl. Rep. 591.

CHAP. XXVIII.

Of REPLICATIONS, and SUBSEQUENT PLEADINGS.

Rule to reply.

WHEN the defendant has delivered his plea, he may rule the plaintiff to reply thereto ^a, by obtaining a rule from the master in the King's Bench, on the back of the plea; which is entered with the clerk of the rules, and a copy served on the plaintiff's attorney. In the Common Pleas, the rule to reply is given on a *præcipe*, with the secondaries; and in the Exchequer, it is given in like manner, in a book kept for that purpose in the Exchequer office ^b. This rule might formerly have been given in term, or within *sixteen* days after, in the King's Bench ^c, or Exchequer ^d. But now, by a general rule of all the courts ^e, "a rule to reply may be given at any time, when the office is open." The rule to reply expires in *four* days exclusive after service in the King's Bench; and *Sunday*, or any holiday on which the court does not sit, or the office is not open, if it be not the last, is to be accounted a day within the rule ^f.

When it expires.

Proceedings by plaintiff, after plea.

Within the time limited by the rule to reply, or order for further time, if the plaintiff mean to proceed in the action, he should either reply or demur to the plea; or if it be well founded in point of fact, and unobjectionable in point of law, he should discontinue his action ^g, enter a *nolle prosequi* ^h, *stet processus* ⁱ, or *cassetur breve* ^k; or, in an action against an executor or administrator, take judgment of assets *in futuro* ^l, &c.

Rule to discontinue.

The rule to discontinue is a side bar or treasury rule, obtained from the clerk of the rules in the King's Bench or Exchequer, or

^a Tidd *Prac.* 9 Ed. 676. Append. thereto, Chap. XXVIII. § 1, 2, 3.

^b Dax Ex. Pr. 1 Ed. 61.

^c Imp. K. B. 10 Ed. 264.

^d R. H. 16 Geo. III. in *Scac. Man. Ex.* Append. 220. Dax Ex. Pr. 1 Ed. 61.

^e R. H. 2 W. IV. *reg.* 1. § 53. 3 Barn. & Ad. 361. 8 Bing. 295. 2 Crompt. & J. 182.

^f R. T. 1 Geo. II. (a.) K. B.

^g Tidd *Prac.* 9 Ed. 678. Append. thereto, Chap. XXVIII. § 9, 10.

^h Tidd *Prac.* 9 Ed. 681. Append. thereto, Chap. XXVIII. § 11, 12, 13.

ⁱ Tidd *Prac.* 9 Ed. 682, 3.

^k *Id.* 683. Append. thereto, Chap. XXVI. § 7.

^l Tidd *Prac.* 9 Ed. 683. Append. thereto, Chap. XXII. § 10. 21, &c.; and see 1 Chit. *Pl.* 6 Ed. 577, &c.

secondaries in the Common Pleas ; but in the latter court, if it were after plea pleaded, the defendant's attorney must formerly have consented to a rule in the treasury chamber in term time, or before a judge in vacation^a; or else there must have been a rule to shew cause. But, by a general rule of all the courts^b, "to entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent; but the rule shall contain an undertaking on the part of the plaintiff, to pay the costs, and a consent that if they are not paid within *four* days after taxation, defendant shall be at liberty to sign a *nonpros*." Where a plaintiff has served a rule to discontinue, and the costs are taxed but not paid, the defendant should proceed on this rule, and is not entitled to judgment as in case of a nonsuit^c.

A *nolle prosequi* is an acknowledgment or agreement by the plaintiff, that he will not further prosecute his suit, as to the whole or a part of the cause of action; or, where there are several defendants, against some or one of them^d. And where a declaration in *debt* consisted of one special, and several general counts, and to the special count there were several special pleas, and to the general counts the general issue; the plaintiff having entered a *nolle prosequi* on the special count, and joined issue on the others, it was ruled at *nisi prius*, that he was entitled to recover on the general counts, though the matters proved might have been given in evidence on the special count, and the pleas thereto^e. But a *nolle prosequi* as to part, entered up after judgment for the whole, is equivalent to a *retraxit*, and a bar to any future action for the same cause^f. And where, in an action of trespass and assault, the defendant pleaded first, not guilty; and secondly, a justification; the plaintiff replied, joining issue on the two pleas, and new assigning; the defendant having demurred to the replication and new assignment, the plaintiff went down to trial, and obtained a verdict with 15*l.* damages on the first issue; after.

Nolle prosequi, what.

As to one of several counts, &c.

^a Imp. C. P. 7 Ed. 723; and see Tidd *Prac.* 9 Ed. 484. 680.

^b R. H. 2 W. IV. reg. I. § 106. 3 Barn. & Ad. 390. 8 Bing. 304. 2 Crompt. & J. 198.

^c Cooper v. Holloway, 1 Hodges, 76.

^d Cro. Car. 239. 243. 2 Rol. Abr. 100. And for the nature and effect of a *nolle prosequi*, and in what cases it may or may not be entered, see Co. Lit. 139 a. 8 Co. 58. Cro. Jac. 211. S. C. Hazdr. 153. 1 Wms. Saund. 5 Ed. 207. *in notis*.

1 Ld. Raym. 598, &c. Noke v. Ingham, 1 Wils. 90. Cooper v. Tiffin, 3 Durnf. & E. 511. Tidd *Prac.* 9 Ed. 681; and for the form of the entry, see Append. thereto, Chap. XXVIII. § 11, 12, 13.

^e Hayward v. Kaia, 1 Moody & M. 311. *per* Ld. Tentarden, Ch. J.

^f Bowden v. Horne, 7 Bing. 716. 5 Moore & P. 756. S. C.; but see Seddon v. Tutop, 6 Durnf. & E. 607. Tidd *Prac.* 9 Ed. 582, 3. Hadley v. Green, 2 Crompt. & J. 374. 2 Tyr. Rep. 390. S. C.

which the plaintiff entered a *nolle prosequi* to the new assignment, and gave the defendant judgment on demurrer; the court, under these circumstances, set aside the *nolle prosequi*†. A *nolle prosequi* might it seems have been entered by the demandant in a writ of intrusion, at any stage of the proceedings, even after issue joined^b.

Costs on *nolle prosequi*, by law amendment act.

Previously to the law amendment act^c, it was holden that where, in *assumpsit* against two defendants, one of them pleaded his bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial and obtained a verdict against the other defendant, who pleaded the general issue, the former was not entitled to costs^d; and that where a *nolle prosequi* was entered on any of the counts in a declaration, the plaintiff was not entitled to costs on such counts^e.

As to one or more of several defendants.

But now, by the above act^f, "where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall have judgment for, and recover his reasonable costs." And "where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf."^g Under this statute, the defendant is entitled to his costs, where a *nolle prosequi* is entered as to part of the sum claimed in the declaration^h. And where, to counts in *assumpsit* for money had and received and on an account stated, the defendant pleaded *non assumpsit*, except as to 3*l.* 5*s.*; a set off, except as to that sum, and payment of 3*l.* 5*s.* into court; and the plaintiff having admitted the set off, taken the money out of court, and declined further to prosecute his action, the court held that the defendant was entitled to the costs of the two first issuesⁱ. The tenant however, in a real action, was not entitled to costs upon a *nolle prosequi*^k.

On any count, or part of declaration.

The new rules of pleading do not, it has been said, apply to replications^l; that is, they do not contain any particular directions

Replications how affected by statutory rules.

^a *Strother v. Randerson*, 5 Dowl. Rep. 280.

^b *Williams v. Harris*, 4 Moore & S. 358; and see *Same v. Same*, *id.* 491. 1 Bing. N. R. 13. 2 Dowl. Rep. 819. S. C.

^c 3 & 4 W. IV. c. 42. § 31.

^d *Harewood v. Matthews*, H. 56 Geo. III. K. B. *Booth v. Middlecoat*, 4 Moore & P. 182. 6 Bing. 445. S. C.

^e *Hubbard v. Biggs*, 16 East, 129.

^f § 32.

^g § 33.

^h *Williams v. Sharwood*, 3 Bing. N. R. 331.

ⁱ *Goodee v. Goldsmith*, 5 Dowl. Rep. 288.

^k *Williams v. Harris*, 1 Bing. N. R. 13. 4 Moore & S. 491. 2 Dowl. Rep. 819. S. C.; and see further as to costs on a *nolle prosequi*, *Tidd Prac.* 9 Ed. 681. 981.

^l *Brown v. Daubeney*, 4 Dowl. Rep. 585. 1 Har. & W. 646. S. C. *per Patteson, J.*

as to the mode of replying to pleas in the different actions to which they relate; though replications and subsequent pleadings, it will be seen^a, are subject to the general rules and regulations applicable to all pleadings, as to their title, commencement, and conclusion, &c. When the plea properly concludes to the country, the plaintiff in general merely adds a *similiter* thereto^b; but when it concludes with a verification, the plaintiff, in his replication, either traverses or denies some material fact stated in the plea, or several facts constituting one point or ground of defence^c; or he confesses and avoids the matter pleaded by the defendant^d, or concludes him by matter of *estoppel*^e. But in order more fully to explain the different modes of replying, and in what manner the replication should deny, or confess and avoid the facts stated in the plea, it may be proper to notice the several reported cases which have been recently determined thereon, in actions upon *contracts*, and for *wrongs*: And first, in actions upon *contracts*.

In *assumpsit*, on a special promise to answer for the debt of a third person, where it was pleaded that there was no *memorandum* in writing signed by the defendant or his agent, a replication alleging that there was such a *memorandum*, without setting it out, was holden to be good on special demurrer^f. But where, to a plea of *coverture* in the defendant, the plaintiff replied that the husband was an alien, and at the time of the contract resided beyond the seas; that the defendant lived in this kingdom, separate and apart from him, as a *feme sole*, and that she made the contract declared on as such *feme sole*; the court held this to be no answer to the plea, it not appearing that the absence of the husband was permanent^g.

It is a good answer to a plea of *bankruptcy* in the defendant, that the certificate was obtained by *fraud*, though the enactment to that effect in 5 Geo. II. c. 30. § 7. is not repeated in 6 Geo. IV. c. 16^h. But a replication to a general plea of *bankruptcy* in the defendant, previously to the latter statute, that the defendant had before been discharged as a bankrupt, by virtue of the statute 5 Geo. II. c. 30ⁱ, and that he had not paid 15*s.* in the pound under the second commis-

Adding *similiter*.

Replications in denial, or confession and avoidance, &c.

To plea of statute of frauds.

Of *coverture*.

Of *bankruptcy* in defendant.

^a *Post*, 430, &c.

^b *Tidd Prac.* 9 Ed. 718. 924, 5.

^c *Id.* 683.

^d *Id.* 685.

^e *Id. ib.* *Ante*, 400.

^f *Wakeman v. Sutton*, 4 Nev. & M. 114. 2 Ad. & E. 78. S. C.; and see *Lilley v. Hewitt*, 11 Price, 494. *accord*; but see *Lowe v. Eldred*, 1 Crompt. & M.

239. 3 Tyr. Rep. 234. S. C. *semb. contra*.

^g *Stretton v. Busnach*, 4 Moore & S. 678; and see *Barden v. De Keverberg*, 2 Meeson & W. 61.

^h *Horn v. Ion*, 4 Barn. & Ad. 78. 1 Nev. & M. 627. S. C.

ⁱ § 7; and see *id.* § 9. 6 Geo. IV. c. 16. § 127.

In plaintiff.

Of plaintiff's
insolvency, &c.

Of *de injuria*,
&c. in *assump-*
sit.

sion, was holden to be ill on special demurrer^a. It has been doubted whether in *debt* on judgment, a replication to a plea of bankruptcy in the plaintiff, after the accruing of the cause of action whereon the judgment was recovered, that plaintiff obtained his certificate before the judgment was recovered, should allege expressly that the certificate was obtained after a commission issued^b. And where a plea in *assumpsit* alleged that the debt sued for had vested in the provisional assignee, the plaintiff having become *insolvent* and executed an assignment under the insolvent debtors' act; and the replication alleged an assignment to a third party before the imprisonment, for a good consideration; the court held, on general demurrer, that the replication was bad, for not alleging that the debtor had notice of such assignment^c.

To a declaration in *assumpsit* on a breach of contract, in not paying for books sold and delivered by bills at certain dates, with security for their being honoured, the defendant pleaded a custom of *London*, that upon such sales the security need not be given, unless required when the books are delivered, and that the plaintiff did not require it at that time; the plaintiff having replied generally, *de injuria*, &c. *absque tali causa*, the court held, on special demurrer, that as the plea did not admit the contract, and offer an excuse for not performing it, the replication was ill^d. But, in answer to a plea shewing a *prima facie* case of a promise, but avoiding it by stating some invalidity in the inception of the contract, *ex. gr.* a want of consideration, a replication that the defendant broke his promise without the cause alleged, is good on demurrer^e: and it seems from later authorities that the replication of *de injuria*, &c. will in future be allowed in *assumpsit*, where the plea consists of matter of excuse^f. When the plaintiff does not reply *de injuria*, &c. generally to the facts stated in a plea, it has been doubted whether the circumstance of his only taking issue on one of them, entitles the jury to treat the facts alleged in the plea, and not denied in the replication, as admitted^g.

^a *Wilson v. Kemp*, 2 Maule & S. 549.
3 Campb. 499. (a.) S. C.; and see *Anon.*
1 Leg. Obs. 317. *per* Ld. *Tenterden*, Ch. J.

^b *Gwinness v. Carroll*, 2 Man. & R. 132.

^c *Buck v. Lee*, 1 Ad. & E. 804. 3.
Nev. & M. 580. S. C.

^d *Whittaker v. Mason*, (or *Marson*), 2
Bing. N. R. 359. 1 Hodges, 319. 2
Scott, 567. S. C.; and see *Solly v. Nelsh*,
2 Crompt. M. & R. 355. 5 Tyr. Rep.
625. 1 Gale, 227. 4 Dowl. Rep. 248. 11
Leg. Obs. 184, 5. S. C.

^e *Noel v. Rich*, 1 Gale, 225. 2 Crompt.
M. & R. 360. 5 Tyr. Rep. 632. 4 Dowl.
Rep. 228. 11 Leg. Obs. 135, 6. S. C.

^f *Griffin v. Yeates*, 2 Bing. N. R. 579.
2 Scott, 845. 1 Hodges, 387. 4 Dowl.
Rep. 647. 11 Leg. Obs. 309. S. C. *Isaac*
v. Farrar, 1 Meeson & W. 65. 1 Tyr. &
G. 281. 4 Dowl. Rep. 750. 1 Gale, 385.
12 Leg. Obs. 156. S. C.

^g *Noel v. Boyd*, 4 Dowl. Rep. 415. 1
Tyr. & G. 211. 11 Leg. Obs. 500, 501.
S. C.

In an action by the drawer against the acceptor of a bill of exchange, where the defendant pleads that the bill was accepted for the accommodation of the plaintiff, and without any consideration passing from him to the defendant, the plaintiff may reply that it was accepted for a good and valuable consideration, and not for the accommodation of the plaintiff, or without consideration, *modo et formâ*, &c. concluding to the country^a; or he may reply that the defendant received consideration for his acceptance, setting it out under a *videlicet*^b, and concluding in like manner to the country; or he may allege in his replication, that the bill was drawn for some particular kind of consideration, setting it forth, and concluding with a verification^c. If a party has given a bill of exchange or check, for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or check^d. But where, in such an action, the defendant pleaded that there was no consideration for the check, and the plaintiff replied that there was consideration, it was doubted whether on such plea, the defendant could insist on the sale being void; and whether, if he could not, the court would give judgment on facts being found specially, under the statute 3 & 4 W. IV. c. 42. § 24^d. Where to a declaration on a promissory note against the maker, he pleaded no consideration, and the plaintiff replied that the note was indorsed to her in part payment of a debt, and that she had no notice of the premises mentioned in the plea, and the defendant rejoined that she had notice, the court, on demurrer, held that the plaintiff was entitled to judgment^e.

To pleas in actions on bills or notes, for want or failure of consideration.

In an action on a bill of exchange, by an indorsee against the acceptor, the defendant having pleaded that he did not accept the bill, on which issue was joined, the court held that it was competent for him, under this plea, to give in evidence, that since he accepted the bill, a material alteration was made in the date of it, which vitiated the bill^f. And where the defendant pleaded to a declaration against

On other grounds.

^a *Bailey v. Catterall*, 1 Moody & R. 379. *per Alderson*, B.; and see *Easton v. Pratchett*, 6 Car. & P. 736. 1 Gale, 30. 4 Tyr. Rep. 472. 3 Dowl. Rep. 472. 9 Leg. Obs. 492. S. C.; but see *Morgan v. Cresswell*, 1 Moody & R. 380. *in notis*, *contra*.

^b *Low v. Burrows*, 4 Nev. & M. 366. 2 Ad. & E. 483. 1 Har. & W. 12. 1 Moody & R. 381. S. C. *in notis*.

^c *Green v. Arnustead*, 1 Moody & R.

380, 81. *per Alderson*, B. 1 Har. & W. 12. S. C. cited; and see *Connop v. Holmer*, 1 Tyr. & G. 85. 4 Dowl. Rep. 451. S. C.

^d *Mills v. Oddy*, 6 Car. & P. 728. *per Parke*, B. 1 Gale, 92. 2 Crompt. M. & R. 103. 5 Tyr. Rep. 571. 3 Dowl. Rep. 722. S. C.; and see *Boulton v. Coghlan*, 1 Hodges, 145. 1 Scott, 588. S. C.

^e *Pearce v. Champneys*, 3 Dowl. Rep. 276.

^f *Cock v. Coxwell*, 4 Dowl. Rep. 187.

the acceptor of a bill of exchange, alleged to have been drawn and indorsed by *S. E.* that she was the wife of *T. E.* who was still alive, a replication that she drew and indorsed the bill by the authority of her husband, was holden to be no departure^a. To a plea by the acceptor of a bill of exchange, that it was, to the knowledge of the holder, negotiated by *fraud*, and that no consideration was given for the indorsement to the holder, it is sufficient for the latter to reply generally, that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration, without setting out the particulars of which it consisted^b. And where, to a declaration on a bill of exchange, by an indorsee against the acceptor, the defendant pleaded a special plea, shewing fraud on the part of the drawer and the subsequent indorsees, and alleging that the plaintiff took the bill with a knowledge of those facts, and concluded by averring that the plaintiff was not a *bond fide* holder of the bill for value; the plaintiff replied that he was a *bond fide* holder of the bill for value; and at the trial, a witness was called for the plaintiff, who proved that he applied to him to discount the bill, and that the plaintiff gave him the money for it, upon his putting his name on the bill as indorser; the learned judge left the case to the jury upon the credibility of the witness, and upon the question whether it was a *bond fide* transaction on the part of the plaintiff, observing that the allegations of fraud, as stated in the plea, were admitted by the replication; and the jury having found for the defendant, *Alderson and Gurney* Barons, on a motion for a new trial, held that the jury were warranted in their finding, and that the verdict ought not to be disturbed: but *Parke and Bolland* Barons, thinking that the jury might have been misled by the observations of the learned judge as to the effect of the admission on the record, were of opinion that the case ought to be submitted to another jury^c. In an action against the maker of a promissory note, where the defendant pleaded that a new note had been made and delivered to the plaintiff on account of the other, and that it was then outstanding in the hands of a third person, a replication that the defendant of his own wrong, and without the cause in his plea alleged, neglected to pay the amount, is it seems bad on special demurrer^d.

^a *Prince v. Brunatle*, 1 Bing. N. R. 435.

¹ *Scott*, 342. 9 Leg. Obs. 332. S. C.

^b *Bramah v. Baker*, (or *Roberts*), 1 Bing. N. R. 469. 1 *Scott*, 350. 3 Dowl. Rep. 392. 1 *Hodges*, 66. 9 Leg. Obs. 460. S. C.; and see *Easton v. Pratchett*, 6 Car. & P. 736. 4 Tyr. Rep. 472. 3

Dowl. Rep. 472. 1 Gale, 30. 9 Leg. Obs. 492. S. C. *Prescott v. Levy*, 1 Moody & R. 382. *in notis*. 3 Dowl. Rep. 403. 1 *Scott*, 726. 9 Leg. Obs. 462. 3. S. C. *Howorth v. Hubbersty*, 9 Leg. Obs. 430.

^c *Noel v. Boyd*, 4 Dowl. Rep. 415.

^d *Crisp v. Griffiths*, 2 Crompt. M. & R.

It was formerly holden, that if a bill or note were taken under such circumstances as that the indorser himself could not recover, the indorsee must have proved that he became so for a good consideration, though no notice were given him to produce such evidence^a: But it was afterwards determined, that in an action by an indorsee against the acceptor of a bill of exchange, the mere absence of consideration for the acceptance and prior indorsements did not throw the *onus* on the plaintiff, of proving the consideration for the indorsement to him, where no circumstances of fraud or illegality appeared^b. And accordingly it is now holden, that where the acceptor of a bill of exchange pleads that it was accepted without any consideration, and the plaintiff replies that it was accepted for a good consideration, the *onus* of proof lies on the defendant, to shew the want of consideration^c; and the plaintiff will not be required to prove consideration, unless some evidence is given by the defendant of fraud, or other suspicious circumstances^c. So where, to an action on a bill of exchange, the defendant pleads want of consideration, and the plaintiff replies that the defendant had consideration for his acceptance, which consideration he states specifically under a *scilicet*, and then concludes to the country, the plaintiff is not bound to prove consideration in the first instance^d. So, in an action on a promissory note, where the defendant pleads that there was no consideration for the note, and the plaintiff replies that there was a good consideration, the issue lies on the defendant, to shew that the note was given by way of accommodation, and without value^e. And where, in an action on a promissory note for 500*l*. by the indorsee against the indorser, the latter pleaded no consideration

Proof of consideration of bill or note, and on whom it lies.

159. 5 Tyr. Rep. 619. 1 Gale, 106. 3 Dowl. Rep. 752. 7 Car. & P. 45. (a.) S. C. Solly v. Neish, 1 Gale, 107. *id.* 227. 2 Crompt. M. & R. 355. 5 Tyr. Rep. 625. 4 Dowl. Rep. 248. 11 Leg. Obs. 134, 5. S. C.; and see Faith v. M^cIntyre, 7 Car. & P. 44.

^a Heath v. Sansom, 2 Barn. & Ad. 291. 296. Parke, J. *dissentiente*; and see Simpson v. Clarke, 1 Gale, 237. 2 Crompt. M. & R. 342. 5 Tyr. Rep. 593. 10 Leg. Obs. 296. S. C.

^b Whittaker (or Whitaker) v. Edmunds, 1 Moody & R. 366. 1 Ad. & E. 638. S. C.; and see Perceval (or Percival) v. Framplin (or Frampton), 3 Dowl.

Rep. 748. 2 Crompt. M. & R. 180. 5 Tyr. Rep. 579. 10 Leg. Obs. 286. S. C.

^c Batley v. Catterall, 1 Moody & R. 379. *per Alderson*, B. M^qr. v. Barber, 1 Meeson & W. 425. 5 Dowl. Rep. 77. 12 Leg. Obs. 77. S. C.

^d Low v. Burrows, 4 Nev. & M. 366. 1 Har. & W. 12. 1 Moody & R. 381, 2. S. C. *in notis*.

^e Lacey v. Forrester, 2 Crompt. M. & R. 59. 5 Tyr. Rep. 567. 3 Dowl. Rep. 668. 1 Gale, 139. 10 Leg. Obs. 172, 3. S. C.; but see Simpson v. Clarke, 1 Gale, 237. 2 Crompt. M. & R. 342. 5 Tyr. Rep. 593. 10 Leg. Obs. 296. S. C.

as to 300*l.*, and that the note was only indorsed for the accommodation of the drawer, and the security of the plaintiffs, who were his bankers; the plaintiffs replied that they were the holders of the note for a valuable consideration given by them to the drawer; the court held that it was not necessary for them, upon this issue, to give proof that they were entitled to the full amount ^a. But where the plaintiff in his replication specifies the particular sort of consideration for which he alleges the bill was accepted, without stating it under a *scilicet*, he must prove his allegation as stated ^b. To an action of *assumpsit* on a bill of exchange, by indorsee against drawers, it was pleaded that the bill was drawn by a partner, but not for partnership purposes, and was indorsed to the plaintiff after it became due; the replication was, that it was not indorsed after it became due, but was indorsed to, and taken and received by the plaintiff before it became due, and the court held that it was sufficient for the plaintiff to put in the bill, and not necessary that he should give any evidence to shew that the bill was indorsed to him before it became due ^c. And where, in an action on a bill of exchange, it is pleaded that the bill was obtained by fraud, to which *de injuria*, &c. is replied, the defendant will be allowed at the trial, after proving the fraud, to throw the *onus* upon the plaintiff, of shewing consideration ^d.

Replication to
plea of payment,
in satisfaction,
&c.

Where the defendant pleaded in *assumpsit* payment of a particular sum, in satisfaction of his promise, and the plaintiff replied that the defendant did not pay the same in satisfaction, nor did the plaintiff receive it in satisfaction, the court on demurrer held the replication to be unobjectionable ^e. And where, to a plea that the work in respect of which plaintiff sued was not, according to agreement, done to the satisfaction of defendant or his surveyor, the plaintiff replied that it was done to the satisfaction of the defendant and his surveyor; without this, that it was not done to the satisfaction of defendant or his surveyor; the court held that upon this issue, it was sufficient ^f to shew that the work was done to the satisfaction of the defendant. In *assumpsit* for money lent, where the defendant

^a *Perceval (or Percival) v. Framplin* (or Frampton), 3 Dowl. Rep. 748. 2 Crompt. M. & R. 180. 5 Tyr. Rep. 579. 10 Leg. Obs. 286. S. C.; and see *Goodall v. Ray*, 4 Dowl. Rep. 76. 1 Har. & W. 333. 10 Leg. Obs. 308. S. C.

^b *Batley v. Catterall*, 1 Moody & R. 379, 80. *per Alderson*, B.

^c *Parkin v. Moon*, 7 Car. & P. 408.

per Alderson, B. after consulting with the other judges.

^d *Isaac v. Farrar*, 1 Tyr. & G. 281. 1 Gale, 385. S. C.

^e *Webb v. Weatherby*, 1 Bing. N. R. 502. 1 Scott, 477. 1 Hodges, 39. S. C.

^f *Bradley v. Milnes*, 1 Bing. N. R. 644. 1 Hodges, 155. 1 Scott, 626. S. C.

pleads payment and acceptance in satisfaction, and the plaintiff new assigns a different debt of the same amount with that confessed in the plea, to which *non assumpsit* is pleaded, the only question for the jury is, whether two debts were incurred, or one only ^a: If the plaintiff therefore prove one debt, and the defendant prove payment of the amount, the effect of the defendant's evidence is to shew that the debt proved by the plaintiff is the debt confessed and avoided by the plea, and not the debt newly assigned; which latter debt therefore remains unproved, upon the issue of *non assumpsit* ^a. The replication to a plea of payment of money into court has been treated of in a former chapter ^b.

Of payment into court.

The replication to a plea of *tender* is *general* or *special*: The *general* replication either denies the fact of the *tender* ^c, or, admitting the fact, takes issue on the plea of *non assumpsit*, or *nunquam indebitatus*, as to the residue of the plaintiff's demand ^d. The plaintiff may also, if his case require it, reply to a plea of *tender*, a *prior* or *subsequent* demand and refusal ^e; to which the defendant may rejoin, that there was no such demand ^f. In an action of *debt*, if the plaintiff reply *nunquam indebitatus* to a plea of set off, and the defendant prove his plea, the plaintiff will not be at liberty, under his replication, to shew that the sum proved, or any part of it, has been paid ^g.

To plea of tender.

Of set off, and evidence thereon.

In *debt* on bond, the defendant, after craving *oyer* of the bond and condition, which was that *A. B.* should faithfully account for all monies received by him as collecting clerk, pleaded that *A. B.* did account; replication, that *A. B.* received divers sums, amounting to 2000*l.* for which he did not account; rejoinder, that the sums mentioned in the replication were three sums of 1000*l.* 500*l.* and 500*l.* received by *A. B.* of *C. D.* and *F.* and *G.*, and that *A. B.* accounted for those sums; surrejoinder, that the sums mentioned in the replication were other and different sums than those alleged in the rejoinder to have been received and accounted for by *A. B.*, and concluding to the

In debt on bond.

^a Hall v. Middleton, 5 Nev. & M. 410.

⁴ Ad. & E. 107. 1 Har. & W. 531. S. C.

^b Chap. XXV. p. 315, 16.

^c 3 Chit. Pl. 6 Ed. 1076.

^d Id. 1077, 8.

^e Giles v. Hartis, 1 Ld. Raym. 254. 2 Salk. 622. 3 Salk. 343. Carth. 413. 12 Mod. 152. Comb. 443. Holt, 546. S. C.; and see Johnson v. Clay, 7 Taunt. 486. 1 Moore, 200. S. C. Birks v. Trippet, 1 Wms. Saund. 5 Ed. 33. (2.) 1 Chit. Pl.

6 Ed. 581, 2. 3 Chit. Pl. 6 Ed. 1077.

^f 3 Chit. Pl. 6 Ed. 1146; and see 2 Went. 538. 3 Went. 81.

^g Brown v. Daubeny, 4 Dowl. Rep. 585. 1 Har. & W. 646. 11 Leg. Obs. 806, 7. S. C. per Patteson, J.; and see Stevens v. Ufford, 7 Car. & P. 97. Cousins v. Paddon, 2 Crompt. M. & R. 547. 5 Tyr. Rep. 535. 4 Dowl. Rep. 488. S. C. Ante, 393.

To plea in excuse of performance.

country; the court held, upon special demurrer, that the surrejoinder was good ^a. Where a defendant pleads matter of *excuse*, which admits a non-performance, except in the case of an award, (which stands on a particular ground,) the plaintiff need not assign a breach in his replication; and the reason is, that the defendant, after such plea pleaded, cannot insist upon performance, without a departure in pleading ^b: but it is otherwise, where a man pleads performance ^b.

In actions for wrongs.

In trover.

It will next be proper to notice the several reported cases which have been recently determined, as to the different modes of replying to pleas, in actions for *wrongs*. In *trover*, the defendant pleaded that *J. H.* was possessed of the goods as of his own property, and that to prevent their being taken in execution, he covinously pretended to sell them to the plaintiff; the replication traversed that *J. H.* did for the purpose, &c. covinously pretend to sell the said goods; and the court held that the replication did not admit that the goods were the property of *J. H.* but that the *onus* was on the defendant, of proving a fraudulent sale by *J. H.* to the plaintiff^c. In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff, being a trader, and being indebted to the defendant in the sum of 100*l.* became bankrupt, wherefore defendant sued out the commission; the plaintiff replied *de injuria*, &c. *absque tali causa*; and the defendant having demurred, assigning for cause that the plaintiff by his replication had attempted to put in issue three distinct facts, *viz.* the act of bankruptcy, the trading, and the petitioning creditor's debt, the court held that these three facts, connected together, constituted but one entire proposition, and that the replication was therefore good ^d.

In action for malicious prosecution.

In replevin.

In *replevin*, the avowry stated that the plaintiff was an inhabitant of a parish, and rateable to the relief of the poor, in respect of his occupation of a tenement, situate in the place in which, &c.; that a rate for the relief of the poor of the said parish was duly made and published, in which the plaintiff was, in respect of such occupation, duly rated in the sum of 7*l.*; that he had notice of the rate, and was required to pay, but refused; that he was duly summoned to a petty sessions, to shew cause why he refused; that he

^a Calvert v. Gordon, 7 Barn. & C. 809. 1 Man. & R. 497. S. C.

^b Shelley v. Wright, Willes, 9. 12, 13; and see Attorney-General v. Elliston, 1 Str. 191. Nicholson v. Simpson, *id.* 299.

^c Nicolls (or Nicholls) v. Bastard, 1

Gale, 295. 1 Tyr. & G. 156. 2 Crompt. M. & R. 659. S. C.

^d O'Brien v. Saxon, 2 Barn. & C. 906. 4 Dowl. & R. 579. S. C.; and see Robinson v. Raley, 1 Bur. 316; but see Regil v. Green, 1 Meeson & W. 328.

appeared, and shewed no cause, whereupon a warrant was duly made, under the hands of two justices of the peace, directed to the defendant, requiring him to make distress of the plaintiff's goods and chattels; that the warrant was delivered to defendant, under which he, as collector, justified the taking the goods as a distress, and prayed judgment and a return: to this avowry the plaintiff pleaded in bar, *de injuriâ*, &c. *absque tali causâ*; and upon a special demurrer, assigning for cause that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted merely in excuse of the taking and detaining, and not on a justification and claim of right, a majority of the judges held that the plea in bar was good^a.

In an action of assault and battery, *de injuriâ*, &c. is a good replication to a plea stating that *I. E.* and *S. B.* were possessed of a close, and that the plaintiff was making noise, &c. therein, and the defendants as servants of *I. E.* and *S. B.* and by their command, requested him to depart, and he refused, whereupon defendants as the servants of *I. E.* and *S. B.* gently laid hands, &c.; and because plaintiff resisted, defendants, as servants, &c. and by command, &c. a little hurt^b, &c. But where, in *trespass* for assault and battery, the defendant, who was the plaintiff's master, pleaded moderate correction, and the plaintiff replied *de injuriâ*, &c., the jury found that the correction was excessive, and gave a verdict for the plaintiff, the court granted a new trial; observing that the replication of *de injuriâ*, &c. only put in issue the cause of correction stated in the plea; and the plaintiff therefore, instead of replying *de injuriâ*, &c. should have admitted the power of the defendant to chastise him, and new assigned the excess, which would have had the effect of raising the real question in dispute^c. So where, in *trespass* against a sheriff and his bailiff, for taking the plaintiff, on a charge of felony, to a police station, and thence to a prison, the sheriff, after pleading the general issue, justified the taking from the police station to the prison, under a *capias ad satisfaciendum*; and the plaintiff, admitting the writ and delivery of the warrant to the bailiff, replied *de injuriâ*, &c. *absque residuo causæ*; the court held that under this replication, the plaintiff could not give evidence to involve the sheriff in the misconduct of the bailiff, committed before the plaintiff arrived at the

In trespass to the person.

^a Selby v. Bardon, 3 Barn. & Ad. 2. per Parke and Patteson, Js. Ld. Tenterden, Ch. J. dissentiente. Bardon v Selby, 9 Bing. 756. 3 Moore & S. 280. 1 Crompt. & M. 500. 3 Tyr. Rep. 430. S. C. in Error.

^b Piggott v. Kemp, 1 Crompt. & M. 197. 3 Tyr. Rep. 128. S. C.

^c Penn v. Ward, 1 Gale, 189. 2 Crompt. & M. & R. 338. 4 Dowl. Rep. 215. 10 Leg. Obs. 396, 7. S. C.

police station^a: In order to the admission of such evidence, the circumstances should have been replied specially^a. And a replication of *de injuriâ*, &c. in *trespass*, with a new assignment that the defendant committed the trespasses with more violence, and in a greater degree than was necessary for the purposes in the plea mentioned, is demurrable^b.

In trespass
*quare clausum
fregit*.

In trespass *quare clausum fregit*, where the defendant in his plea claims in his own right, or as servant to another, any interest in the land, or any common or rent issuing out of the same, or a way or passage over it, a replication of *de injuriâ*, &c. *absque tali causâ*, is bad on general demurrer^c. So, where the defendant sets out a possessory title in *A. B.* giving colour to the plaintiff, and justifies as servant of *A. B.* and the plaintiff puts the whole plea in issue, by replying *de injuriâ*, &c. *absque tali causâ*, such replication is bad for duplicity^d. But where, in an action of *trespass* for breaking and entering a close, the plaintiff replied to a plea of right of common, traversing that the defendant's cattle were his own cattle, that they were *levant and couchant* upon his premises, and that they were commonable cattle, the court held that the replication was not double; for though several facts were put in issue, they constituted only one point, namely, whether the defendant's cattle were entitled to common^e. And where, in *trespass* for breaking and entering the plaintiff's dwelling house, and assaulting and imprisoning him, &c. the defendant pleaded first, not guilty; 2dly, as to all the trespasses alleged, except the breaking of the house, a justification under a writ of *capias ad satisfaciendum* and warrant thereon, by virtue of which the defendant entered the house, (*the outer door being open*,) and arrested the plaintiff; the plaintiff replied *de injuriâ*, &c., *absque residuo causæ*; and it was proved that the defendants, who were bailiffs, in execution of the warrant, broke open the outer door of the plaintiff's house, and so gained an entrance, and arrested him; the court held that the averment in the plea, that the outer door was open, was a material averment, for that the door's being open was a condition precedent to the defendant's right to enter, and

^a Price v. Peek, 1 Bing. N. R. 360.

^b Scott, 205. S. C.

^c Thomas v. Marsh, 5 Car. & P. 596.
per Parke J.; and see Cheasley v. Barnes,
10 East, 73. 80. Taylor v. Smith, 7 Taunt.
156. Solly v. Neish, 1 Gale, 107. 227.
2 Crompt. M. & R. 335. 4 Dowl. Rep.
248. 11 Leg. Obs. 134, 5. S. C.

^d Hooker v. Nye, 1 Crompt. M. & R.

258. 4 Tyr. Rep. 777. S. C.; and see

Reece v. Taylor, 1 Har. & W. 15. 4 Nev.
& M. 469. S. C. Tidd Prac. 9 Ed. 683, 4.

^e Vivian v. Jenkins, 5 Nev. & M. 14.

1 Har. & W. 468. S. C.

^f Robinson v. Raley, 1 Bur. 316.

arrest the plaintiff in his house; and therefore, that the plea was sufficiently traversed by the general replication, and it was not necessary to reply the breaking of the outer door ^a.

It has been doubted, whether upon issue joined on a plea of *liberum tenementum* in *trespass*, the plaintiff may prove *twenty years'* adverse possession; or whether it must be replied specially ^b. And where in *trespass*, for breaking and entering the plaintiff's close, called the *rail road*, &c. the defendants pleaded that the occupiers of the adjoining closes had for *twenty years*, as of right and without interruption, used, and been accustomed to use, the privilege and easement of passing and repassing, &c. and laying down rail roads, across the plaintiff's rail road; upon a replication to this plea, traversing the claim of right, the court held that the defendants were bound to shew an uninterrupted enjoyment as of right, during the period of *twenty years*; and that the plaintiffs might prove, under that issue, applications by the defendants, during the *twenty years*, for leave to cross their rail road, and that it was not necessary for them to reply such licence specially, under the statute 2 & 3 W. IV. c. 71 ^c. So, in *trespass quare clausum fregit*, where the defendant pleaded a way used for *forty years*, by the occupiers of his farm, as of right and without interruption, and there was a replication, traversing the user as of right, the court held that under this issue, the plaintiff might give in evidence that the way had been used by leave and licence only ^d. But a plea of *twenty years'* user of a right of way, under the above statute, is not defeated by proof of an agreed alteration in the line of way, nor by a temporary non-user, under an agreement of the parties ^e.

In *trespass de bonis asportatis*, in respect of the removal of several articles, a plea justifying the removal *damage feasant*, enures as a several plea in respect of each article, and the plaintiff may reply severally: Thus, the plaintiff may traverse the justification as to one article, and as to another he may reply excess; and the insufficiency of one of such sectional replications, demurred to for duplicity, in putting in issue the whole plea by a traverse *absque tali causa*, where, in respect of matter of title disclosed by the defendants, the plain-

^a Kerbey v. Denby, 1 Meeson & W. 336. 1 Tyr. & G. 689. S. C.

^b Lowe v. Govett, 3 Barn. & Ad. 868; and see Hawke v. Bacon, 2 Taunt. 156.

^c Monmouth Canal Company v. Harford, 1 Crompt. M. & R. 614. 5 Tyr. Rep. 68. S. C.

^d Beasley v. Clarke, 2 Bing. N. R. 705. 3 Scott, 258. 5 Dowl. Rep. 50. 12 Leg. Obs. 309. S. C.

^e Payne v. Shedden, 1 Moody & R. 382. per Patteson, J.; and see Jones v. Price, 3 Bing. N. R. 52. 3 Scott, 376. S. C. Ante, 392.

tiff should have put in issue a portion only of the plea, by traversing *absque residuo causæ*, does not affect the validity of the other replications to the same plea ^a.

New assign-
ment.

In actions of *trespass*, and other actions, the plaintiff, who has alleged in his declaration a general wrong, may, in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh, with all its specific circumstances, in such manner as clearly to ascertain and identify it, consistently with his general complaint; which is called a *new* or *novel* assignment ^b.

Rule to rejoin,
or plead to new
assignment.

If the plaintiff reply, without joining issue, the defendant may be called upon to *rejoin*; or if there be a new assignment, he may be ruled to plead thereto, in like manner as to the original declaration ^c. A rejoinder is the defendant's answer to the replication: and if any thing more be required than a *similiter*, it is either in denial, or confession and avoidance, &c.; and after a rejoinder, if the parties are not yet at issue, the plaintiff must *surrejoin*, the defendant *rebut*, and the plaintiff *surrebut*, &c. until issue is joined. The rule for these purposes is given in like manner as the rule to reply ^d; and if the defendant neglect to rejoin, or rebut, &c. when called upon for that purpose, the plaintiff may sign judgment by default, as for want of a plea ^e.

Replications, &c.
how entitled.

Replications, and subsequent pleadings were formerly *entitled*, like pleas, of the term in which they were pleaded; or, if pleaded in vacation, of the preceding term. But, by a general rule of all the courts ^f, "every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date."

Commence-
ments of.

Where the plea began with a statement that the plaintiff ought not to have or maintain his action, (*actionem non*, &c.) the replication began by saying that he ought not to be barred or precluded from having and maintaining it, (*precludi non*, &c.) When the plea began by saying that the defendant ought not to be charged with the debt by virtue of the writing obligatory, the replication began by saying that

^a *Vivian v. Jenkins*, 5 Nev. & M. 14.
1 Har. & W. 468. S. C.

^b 3 Blac. Com. 311. and see *Tidd Prac.*
9 Ed. 608, &c.

^c *Append. to Tidd Prac.* 9 Ed. Chap.
XVIII. § 2. *id.* (a); and for the demand
of a plea to a new assignment, in *K. B.*
see *id.* § 11.

^d *Append. to Tidd Prac.* 9 Ed. Chap.
XXVIII. § 1, 2, 3.

^e *Tidd Prac.* 9 Ed. 608.

^f *R. Pl. Gen. H.* 4 W. 4. reg. 1. 5
Barn. & Ad. Append. i. 10 *Blag.* 464.
2 *Crompt. & M.* 11.; and see *Harris v.*
Mathews, 4 *Dowl. Rep.* 608. 11 *Leg.*
Obs. 165. S. C.

notwithstanding any thing alleged in the plea, he ought to be charged, &c. : But now, by a late statutory rule of pleading^a, "it shall not be necessary in any replication, or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of *precludi non*, or to the like effect; and all replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in maintenance of the whole action: provided, that nothing therein contained shall extend to cases where an *estoppel* is pleaded."

By statutory rule.

The *body* of the replication, &c. after its commencement, is not, we have seen^b, materially affected by the late statutory rules of pleading; except that it is declared by one of them^c, that "no venue shall be stated in the body of the declaration, or in any subsequent pleading: provided, that in cases where local description is now required, such local description shall be given." In order to avoid duplicity, when a party was to answer two matters, and yet by law he could only plead or reply to one of them, he might formerly have *protested* against the one, and pleaded or replied to the other; as where a delivery and acceptance were stated of money or goods, &c. he might have protested against the delivery, and taken issue on the acceptance, &c. This was called a *protestation*, or *protestando*; and was defined to be a saving to the party who took it, from being concluded by any matter alleged or objected against him on the other side, upon which he could not take issue^d. But, by a late statutory rule of pleading^e, "no protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made."

Body of.

Protestando, what.

Abolished.

In concluding the replication, where it is intended to be in maintenance of the whole action generally, it is not necessary, by a late statutory rule^f, to use any prayer of judgment: But where, in trespass *de bonis asportatis*, the defendant justified *damage feasant*, and the plaintiff replied excess, such replication, if filed before *Easter* term 1824, when the above rule came into operation, must have

Conclusions of replications, &c.

^a R. Pl. Gen. H. 4 W. IV. reg. 9. 9 Ed. 687, 8.
5 Barn. & Ad. Append. v. 10 Bing. 467.

^b 2 Crompt. & M. 17.

^c *Id.* 389.

^d R. Pl. Gen. H. 4 W. IV. reg. 8. 5 Barn. & Ad. Append. v. 10 Bing. 467. 2 Crompt. & M. 16.

^e *Greysbrooke v. Foxe*, Plowd. 276. b. Finch L. 359, 60; and see *Tidd Prac.*

^f R. Pl. Gen. H. 4 W. IV. reg. 12. 5 Barn. & Ad. Append. v. 10 Bing. 467. 2 Crompt. & M. 17.

^g R. Pl. Gen. H. 4 W. IV. reg. 9. 5 Barn. & Ad. Append. v. 10 Bing. 467. 2 Crompt. & M. 17. As to the mode of concluding replications, before the late statutory rule, see *Tidd Prac.* 9 Ed. 692, 8.

After special
traverse.

Signing replica-
tions, &c.

Delivery of re-
plications, &c.

Judgment of
non pros for not
replying, and
demand of repli-
cation, &c.

concluded with a prayer of judgment^a. In an action on a bill of exchange, the defendant pleaded want of consideration, concluding with a verification; and the plaintiff, instead of replying by taking issue on the plea, merely added a *similiter*; and after verdict for the plaintiff, the court held that the record was imperfect, and that there must be a repleader; but to save expense, the plaintiff was allowed to amend, on payment of costs^b. It is also a rule^c, that "all special traverses^d, or traverses with an inducement of affirmative matter^d, shall conclude to the country: Provided, that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial." If the replication or rejoinder, &c. conclude with a verification, it must be signed by counsel: but by a general rule of all the courts^e, it is not, we have seen^f, necessary that any pleadings which conclude to the country should be so signed^g.

In the King's Bench, when the plea was entered in the general issue book, or delivered to the plaintiff's attorney, the replication and rejoinder, &c. were formerly delivered in all cases to the adverse attorney; but otherwise they were filed in the office of the clerk of the papers: and a *similiter* to the general issue must have been delivered, or the defendant would have been entitled to sign a judgment of *non pros*^h. In the Common Pleas, the replication or rejoinder, &c. were either filed in the prothonotaries' office, or delivered to the defendant's attorney. But, by a general rule of all the courts^h, "no pleading, subsequent to the declaration, shall in any case be filed with any officer of the court; but the same shall always be delivered between the parties."

If the plaintiff do not reply, surrejoin, or surrebut, &c. within the time limited by the rule, or obtain an order for further time, the defendant may in general sign a judgment of *non pros*: and it was not formerly necessary for him, in the King's Bench, to demand a replication, &c.; the service of a copy of the rule being deemed in that court a demand of itselfⁱ. In the Common Pleas, a replication, &c.

^a Vivian v. Jenkins, 5 Nev. & M. 14.
3 Ad. & E. 741. 1 Har. & W. 468. S. C.

^b Wordsworth v. Brown, 3 Dowl. Rep.
598.

^c R. Pl. Gen. H. 4 W. IV. reg. 13. 5
Barn. & Ad. Append. vi. 10 Bing. 467. 2
Cromp. & M. 17.

^d As to special traverses, and the in-
ducements thereto, see Tidd Prac. 9 Ed.
684.

^e R. H. 2 W. IV. reg. 1. § 107. 3 Barn.
& Ad. 390. 8 Bing. 805. 2 Cromp. & J.
198.

^f Ante, 411.

^g Hollis v. Buckingham, 3 Dowl. &
R. 1; and see Tidd Prac. 9 Ed. 693.

^h R. Pl. H. 4 W. IV. reg. 1. 5 Barn. &
Ad. Append. xiv. 10 Bing. 453. 2 Cromp.
& M. 1.

ⁱ Imp. K. B. 10 Ed. 263.

must have been demanded in writing by the defendant's attorney, before judgment was signed ^a: And, by a general rule of all the courts ^b, "no judgment of *non pros* shall be signed for want of a replication, or other subsequent pleading until *four* days next after a demand thereof shall have been made in writing upon the plaintiff, his attorney or agent, as the case may be." But, by a subsequent regulation ^c, "service of a rule to reply, or to plead any subsequent pleading, shall be deemed a sufficient demand of a replication, or such other subsequent pleading." By this regulation, service of a rule to reply, or to plead any subsequent pleading, is necessary ^d. And where, on the 5th of *August*, the defendant delivered his plea, and on the same day served a rule to reply, and the plaintiff not having replied, the defendant, on the 27th of *August*, signed judgment of *non pros*, the court were of opinion, that as the plaintiff was prevented, by the operation of the statute 2 W. IV. c. 39. § 11 ^e, from delivering his replication, it followed that the defendant could not sign judgment for want of it, having allowed the 10th of *August* to go by, and therefore that the judgment was irregular; and they made the rule absolute for setting it aside, with costs ^f. Where a defendant was under terms of rejoining *gratis*, and the plaintiff signed judgment for want of a rejoinder, when he might have himself added a *similiter*, the court set aside the judgment, but without costs ^g.

^a Imp. C. P. 7 Ed. 294, 5; and see Tidd *Prac.* 9 Ed. 676. 693.

^b R. T. 1 W. IV. *reg.* IV. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 471.

^c R. H. 2 W. IV. *reg.* I. § 54. 3 Barn. & Ad. 381. 8 Bing. 295. 2 Crompt. & J. 183.

^d Pound v. Lewis, 3 Moore & S. 210.

^e Dowl. Rep. 744. S. C.

^f *Ante*, 132, 3.

^g Anon. 13 Leg. Obs. 120.

^h Seaton v. Seale, (or Skey,) 1 Har. & W. 210. 3 Dowl. Rep. 537. 10 Leg. Obs. 60, 61. S. C.; and see Wye v. Fisher, 3 Bos. & P. 443.

CHAP. XXIX.

Of DEMURRERS, and AMENDMENT.

Demurrer what.
To the whole, or
part of declara-
tion, plea, repli-
cation, &c.

A DEMURRER admits the facts, and refers the law arising thereon to the judgment of the court^a; and it is either to the *whole*, or *part* of a declaration, or to the plea, replication, &c. When there are several counts in a declaration, some of which are good in point of law, and the rest bad, the defendant can only demur to the latter; for if he were to demur generally to the whole declaration, the court would give judgment against him^b. So, if the sum demanded by a declaration in *scire facias* be divisible on the record, and there be no objection to one part of it, a demurrer which goes to the whole is bad^c. If a plea or replication, which is entire, be bad in part, it is in general bad for the whole^d: But a plea of set off, wherein the demands are divisible, and in nature of several counts in a declaration, forms an exception to this rule^e.

General or
special.

Demurrers are *general* or *special*^f: the former are to the *substance*, the latter to the *form* of pleading: Thus, if a defective title be alleged, it is a fault in substance, for which the party may demur generally; but if a title be defectively stated, it is only a fault in form, which must be specially assigned for cause of demurrer^g. In the King's

Special, when
defendant is

^a Co. Lit. 71. *b. Leaves v. Bernard*, 5 Mod. 152; and see Tidd *Prac.* 9th Ed. 694.

^b 1 Wms. Saund. 5 Ed. 286. (9.) 2 Wms. Saund. 5 Ed. 380. (14.) *Duke of Bedford v. Alcock*, 1 Wils. 248. *Judin v. Samuel*, 1 New Rep. C. P. 43. *Spyer (or Spiers) v. Thelwell*, 2 Crompt. M. & R. 692. 1 Tyr. & G. 191. 1 Gale, 348. S. C. *Fergusson v. Mitchell*, 4 Dowl. Rep. 513. 2 Crompt. M. & R. 687. 1 Tyr. & G. 179. 1 Gale, 348. S. C. *Price v. Williams*, 1 Meeson & W. 6. 1 Tyr. & G. 197. S. C. *Wainwright v. Johnson*, 5 Dowl. Rep. 317.

^c *Powdick v. Lyon*, 11 East, 565.

^d 1 Wms. Saund. 5 Ed. 28. (2.) 337.

(1.) *Webber v. Tivill*, 2 Wms. Saund. 5 Ed. 127. *b. c. Parker v. Atfield*, 1 Salk. 312. *Trueman v. Hurst*, 1 Durnf. & E. 40. *Duffield v. Scott*, 3 Durnf. & E. 374. *Crump v. Adney*, 1 Crompt. & M. 362. 3 Tyr. Rep. 279. S. C. *Tremere v. Morison*, 1 Bing. N. R. 72. 96; and see 1 Chit. Pl. 4 Ed. 464, 5. *Steph. Pl.* 159, &c.

^e *Dowland v. Thompson*, 2 Blac. Rep. 910.

^f Co. Lit. 72. *a. Steph. Pl.* 1 Ed. 61, 2. 159, 60.

^g As to demurrers at common law, and by stat. 27 Eliz. c. 5. & 4 Ann c. 16. see Tidd *Prac.* 9 Ed. 694, 5.

Bench, the defendant, when under terms of pleading issuably, could not formerly have demurred specially to the replication; and if he did, the plaintiff might have signed judgment as for want of a plea ^a. But it is now holden in that court ^b, as well as in the Common Pleas ^c and Exchequer ^d, that the condition of pleading issuably applies only to the stage of the proceedings in which it is imposed, and does not affect subsequent proceedings: Therefore, where a defendant, being under terms of pleading issuably, puts in an issuable plea, to which the plaintiff replies, the defendant may demur specially to the replication ^b.

under terms of pleading issuably.

The form of a demurrer was directed, by a late statutory rule of pleading ^e, to be as follows: "The said defendant, by — his attorney, (or in person, &c. or the said plaintiff) says that the declaration (or plea, &c.) is not sufficient in law," *shewing the special cause of demurrer, if any*. And, by another rule ^f it is ordered, that "in the margin of every demurrer, before it is signed by counsel, some matter in law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea: Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the court in the usual way." This rule, however, does not extend to *revenue* causes ^g.

Form of demurrer.

Statement of matter of law, in margin of.

Further matters of law may be insisted on in argument.

Upon this rule, the court of Exchequer granted a rule *nisi*, for setting aside a frivolous demurrer, stating several causes of demurrer for which there was clearly no foundation, with a note in the margin, specifying the grounds of demurrer assigned ^h. And where a declaration stated a promise to the plaintiff and *A. B.* now deceased in his life-time, and in a second count stated that the defendant was indebted to the plaintiff and the said *A. B.* in his life-time, but did not aver that he was deceased, the defendant having demurred to the second count, the court held that the demurrer was frivolous ⁱ: and

When set aside as frivolous, and when not.

^a *Sawtell v. Gillard*, 5 Dowl. & R. 620.

^b *Barker v. Gleadow*, 5 Dowl. Rep. 134.
12 Leg. Obs. 388. S. C.

^c *Betts v. Applegarth*, 4 Bing. 267.
12 Moore, 501. S. C.

^d *Gisborne v. Wyatt*, 3 Dowl. Rep. 505. 1 Gale, 35. 10 Leg. Obs. 46. S. C.

^e *R. Pl. Gen. H.* 4 W. IV. reg. 14. 5 Barn. & Ad. Append. vi. 10 Bing. 468. 2 Crompt. & M. 17, 18. And for forms of demurrers to declarations, pleas, or replications, &c. see 1 Chit. Jun. Pl. 26,

&c.; and of special causes of demurrer thereto, *id.* 28, &c.

^f *R. Pr. H.* 4 W. IV. reg. 2. 5 Barn. & Ad. Append. xiv. 10 Bing. 463. 2 Crompt. & M. 1, 2.

^g *Rex v. Woollett*, 3 Dowl. Rep. 694. 1 Gale, 157. 2 Crompt. M. & R. 256. 5 Tyr. Rep. 786. 10 Leg. Obs. 235. S. C.

^h *Kinnear v. Keane*, 3 Dowl. Rep. 154. 9 Leg. Obs. 60. S. C.

ⁱ *Undershell v. Fuller*, 1 Crompt. M. & R. 900. 5 Tyr. Rep. 392. S. C.

it being so late in the term that there was not sufficient time to set it down for argument, they would only let the defendant in to plead on an *affidavit* of merits, pleading *instantly*, and paying the costs of the demurrer, and the application ^a. It is not sufficient to state as a ground of demurrer to a declaration, in an action by an attorney, that he seeks to recover for "materials" supplied by him to his client ^b. And in an action for a libel, it is not a sufficient statement in the margin, of the cause of demurrer to a plea, that it is no justification of the libel ^c: But it is sufficient to state that the pleas are bad, for the causes specially assigned in the demurrer ^d. And the court refused to set aside a demurrer as frivolous, on the ground that the declaration, which was in *debt* on a promissory note, did not shew that the words "value received" were in the note ^e. So, where a declaration upon a bill of exchange stated that on a certain day, the plaintiff made his bill of exchange, payable one month after date, "which period has now elapsed," following the form given in the rule of *Trin.* 1 W. IV. *Sched.* No. 4, to which there was a special demurrer, on the ground that it did not appear that the bill was due at the time of commencing the suit, the court refused to set aside the demurrer as frivolous ^f: and they refused to set aside a demurrer, in an action of *assumpsit* by two plaintiffs, where the allegation in the declaration was, that the defendant was indebted to the *plaintiff*, and not to the *plaintiffs*, which was the ground of demurrer marked in the margin ^g. It is necessary, in these cases, to bring the matter before the court, either on an *affidavit*, stating the pleadings, &c. or to draw up the rule, on reading the declaration, plea, or demurrer ^h, &c. And therefore where a rule for setting aside a demurrer, on the ground of its being frivolous, was drawn up on reading the *affidavit* only, which *affidavit* was insufficient, the court discharged the rule ⁱ. If the point intended to be raised is not stated in the margin of the demurrer, this is not it seems a sufficient objection to its being argued: the rule in such case only enables the opposite party to set aside the demurrer ^k.

^a Underhill v. Hurney, 3 Dowl. Rep. 495.

^b Fisher v. Snow, 3 Dowl. Rep. 27.

^c Ross v. Robeson, 1 Gale, 102. 3 Dowl. Rep. 779. 10 Leg. Obs. 348. S. C.

^d Berridge v. Priestley, 5 Dowl. Rep. 306. 18 Leg. Obs. 289. S. C.

^e Cresswell v. Crisp, 2 Dowl. Rep. 635. 9 Leg. Obs. 44. S. C. Lyons v. Cohen, 3 Dowl. Rep. 243. *per Parke*, B.

^f Aslett v. Abbott, 1 Tyr. & G. 448.

Abbott v. Aslett, (*or* Arlett), 1 Meeson & W. 209. 4 Dowl. Rep. 759. S. C.

^g Tyndall v. Ullithorne, 3 Dowl. Rep. 2. 9 Leg. Obs. 60, 61. 205, 6. S. C. *per Littleale*, J.

^h 1 Crompt. M. & R. 900. (a.)

ⁱ Howorth v. Hubbersty, 3 Dowl. Rep. 455. 1 Crompt. M. & R. 900. (a.) 9 Leg. Obs. 430. S. C.

^k Lacey v. Umbers, 3 Dowl. Rep. 732. 10 Leg. Obs. 286. S. C.

All demurrers, whether *general*, or *special*, must be signed by counsel ^a, or a serjeant ^a; or by the attorney-general, in a *revenue* cause ^b. In the King's Bench, all general demurrers to the declaration must have been formerly delivered ^c to the plaintiff's attorney; but special demurrers, or general demurrers after special pleas, must have been filed in the office of the clerk of the papers, who made copies of them; and a general demurrer to part of a declaration, and the general issue to the rest ^d, or a general demurrer to a plea of *nil debet* in an action of *debt* on bond ^e, must have been delivered to the opposite attorney, and not filed with the clerk of the papers. In the Common Pleas, all demurrers, whether general or special, might either have been filed in the prothonotaries' office, or delivered to the opposite attorney ^f. But by a general rule of all the courts ^g, "no demurrer shall in any case be *filed* with any officer of the court, but the same shall always be *delivered* between the parties."

In the King's Bench, when either party demurred, he formerly obtained a rule from the master, and entered it with the clerk of the rules, for the opposite party to join in demurrer ^h; a copy of which rule was duly served. In the Common Pleas, a rule to join in demurrer was given with the secondaries ⁱ, in like manner as the rule to plead; and a joinder in demurrer must have been demanded ^k before judgment: But, by a general rule of all the courts ^l, "no rule for joinder in demurrer shall be required; but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within *four* days after such demand, to deliver the same, otherwise judgment." The form of a joinder in demurrer was directed by a late statutory rule of pleading ^m, to be as follows: "The said plaintiff (*or* defendant) says that the declaration (*or* plea, &c.) is not sufficient in law." In the Common Pleas, a joinder in demurrer must formerly have had a

All demurrers must be signed.

When formerly delivered, or filed.

Must now be delivered in all cases, between the parties.

Rule to join in demurrer.

Not now required.

Form of joinder in demurrer.

Need not be signed.

^a Anon. *per Cur.* T. 21 Geo. III.

K. B. Douglas v. Child, E. 38 Geo. III.

C. P. Neal v. Richardson, 2 Dowl. Rep.

89. 6 Leg. Obs. 460. S. C. Excheq.

^b Rex v. Woollet, 3 Dowl. Rep. 694.

^c Gale, 157. 10 Leg. Obs. 285. S. C.

^d Rowsell v. Cox, 1 Chit. R. 212.

Fry v. Champneys, 2 Chit. R. 295.

^e Dymock v. Stevens, 3 Dowl. & R. 248.

^f Herbert v. Taylor, 5 Barn. & C. 766.

8 Dowl. & R. 609. S. C.

^g Imp. C. P. 7 Ed. 298; and see Tidd *Prac.* 9 Ed. 696.

^h R. Pr. H. 4 W. IV. reg. 1. 5 Barn. & Ad. Append. xiv. 10 Bing. 453. 2 Cromp. & M. 1.

ⁱ Append. to Tidd *Prac.* 9 Ed. Chap. XXIX. § 7.

^j *Id.* § 8.

^k *Id.* § 9.

^l R. Pr. H. 4 W. IV. reg. 3. 5 Barn. & Ad. Append. xiv. 10 Bing. 453. 2 Cromp. & M. 2.

^m R. Pl. Gen. H. 4 W. IV. reg. 14. 5 Barn. & Ad. Append. vi. 10 Bing. 468. 2 Cromp. & M. 18.

serjeant's hand ^a; but in the King's Bench and Exchequer, it need not it seems have been signed by counsel ^b: And now, by a general rule of all the courts ^c, "to a joinder in demurrer, no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof."

Amendments at common law, or by statute.
Of fines and recoveries.

Amendments are either at common law, or by statute ^d: and, when the amendment is by statute, it is a general rule that there must be something to amend by ^e. In compliance with this rule, it was holden that fines and recoveries, being considered as common assurances, might be amended by the court of Common Pleas, when they had sufficient authority, so as to effectuate the intention of the parties. The ground upon which the court proceeded, in making these amendments, was the statute 8 Hen. VI. c. 12, which authorized them to amend the *misprision* of the clerk; and as the *præcipe* was the cursor's instruction for an *original* writ, so a deed to lead or declare the uses was considered as his instruction for a fine or recovery ^f. But fines and recoveries being abolished by the statute 3 & 4 W. IV. c. 74. there is a clause therein ^g, that "if it shall be apparent, from the "deed declaring the uses of any fine already levied, or hereafter to "be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or "conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such

Fines made valid, without amendment.

^a *Brooker v. Simpson*, 2 Bos. & P. 336; and see *Pitcher v. Martin*, 3 Bos. & P. 171. *in notis*.

^b *Thynne (or Pim) v. Woodman*, 2 Tyr. Rep. 494. 1 Dowl. Rep. 560. 2 Crompt. & J. 464. S. C.; and see *Tidd Prac.* 9 Ed. 696.

^c *R. Pr. H.* 4 W. IV. reg. 4. 5 Barn. & Ad. Append. xiv. 10 Bing. 453. 2 Crompt. & M. 2.

^d For amendments at common law, see *Tidd Prac.* 9 Ed. 696, 7. 711; by statute, *id.* 712; in real actions, *id.* 699; in ejectment, *id.* 1206, 7; in penal actions, *id.* 711, 12; of mesne process, *id.* 130. 161. 448, 9. (*ante*, 107, 8;) of the declaration, *id.* 426, 7. 602, 3. 697, 8. 707, 8; of rules of court, *id.* 506; of pleas, and replications, &c. *id.* 697. 708, 9, 10. (*ante*, 412, 13;) of writs of inquiry, *id.* 573, 4; of jury process, *id.* 926; of variances

between evidence and record, *Post*, Ch. XXXVII.; of the *postea*, and verdict, *id.* 713. 901, 2; of special verdicts, *id.* 713. 897; of special cases, *id.* 899; of judgments, *id.* 713. 942; of executions, *id.* 713. 999; of rolls, &c. *id.* 707, 8. 712. 732; of writs of *scire facias*, *id.* 1123; of writs of error, *id.* 1161, &c.; after demurrer, or joinder, *id.* 709, 10; after argument on demurrer, *id.* 710, 11; after nonsuit or verdict, *id.* 697. 709; after error brought, *id.* 714; and of proceedings in inferior courts, *id.* 714, 15.

^e *Tidd Prac.* 9 Ed. 718.

^f *Loggin*, demandant; *Rawlins*, tenant; *Barnes*, 22; and for the cases in which fines and recoveries were, or were not amendable, before the statute 3 & 4 W. IV. c. 74, see *Tidd Prac.* 9 Ed. 699. 701.

^g § 7.

" case the fine, without any amendment of the indentures, record, or
 " proceedings, in which such error, misdescription, or omission shall
 " have occurred, shall be as good and valid as the same would have been,
 " and shall be held to have passed all the lands intended to have been
 " passed thereby, in the same manner as it would have done, if there
 " had been no such error, misdescription, or omission." On this clause,
 the court refused to amend a fine, in a case of mis-description cured
 by the statute^a. And they would not amend the warrant of attorney
 for suffering a recovery, even to the extent of transposing names
 placed in a wrong order^b.

By another clause of the same statute^c, " if it shall be appa-
 " rent, from the deed making the tenant to the writ of entry, or other
 " writ for suffering a common recovery, already suffered, or here-
 " after to be suffered, that there is in the exemplification, record, or
 " any of the proceedings of such recovery, any error in the name of
 " the tenant, demandant, or vouchee in such recovery, or any misde-
 " scription or omission of lands intended to have been passed by such
 " recovery, then and in every such case the recovery, without any
 " amendment of the exemplification, record, or proceedings in which
 " such error, misdescription, or omission shall have occurred, shall be
 " as good and valid as the same would have been, and shall be held to
 " have passed all the lands intended to have been passed thereby, in
 " the same manner as it would have done, if there had been no such
 " error, misdescription, or omission. Provided always, that nothing
 " in this act contained shall lessen or take away the jurisdiction of any
 " court, to amend any fine or common recovery, or any proceeding
 " therein, in cases not provided for by this act." ^d

Recoveries made
 valid, without
 amendment.

Saving jurisdic-
 tion, in cases not
 provided for.

^a Lockington, demandant; Shipley and
 wife, conusors; 1 Bing. N. R. 355. 1
 Scott, 263. S. C.

^c § 8.

^d § 9.

^b Lamont, vouchee, 3 Bing. N. R.

CHAP. XXX.

Of the ISSUE; and ENTRIES of PROCEEDINGS on RECORD.

Issue, what.

AN *issue* is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant ^a; but it more commonly signifies the entry of the allegations or pleadings themselves: And it is either in *law*, upon a demurrer; or in *fact*, which is triable by the court, upon *nul tiel record*, or by a jury, upon pleadings concluding to the country ^b.

General or special.

The issue, as dependent on the pleadings, is *general* or *special*. The former is made up where the defendant pleads the general issue, or common plea in denial of the *contract* or *wrong* stated in the declaration. The latter is made up where the defendant pleads one or more *special* pleas, either alone or jointly with the general issue, in confession and avoidance of the *contract*, or excuse or justification of the *wrong*, or in *discharge* of the cause of action.

Bywhom, when, and how formerly made up.

In the King's Bench, in every action wherein the defendant pleaded the general issue, or demurred generally to the declaration; on a plea of *plene administravit* by an executor or administrator; in *debt*, when the defendant pleaded a special *non est factum*, *comperuit ad diem* to a bail bond, or *nul tiel record* to an action on a judgment or recognizance; in *covenant*, when his plea concluded to the country; and in *trespass*, when he pleaded *son assault demesne*, *liberum tenementum*, or not guilty to a new assignment, the issue was formerly made up by the attornies; who likewise made up all issues and demurrers upon writs of error, *scire facias*, and *audita querela*, and repleaders, or other matters formerly entered of record ^c. And upon a general demurrer to a plea of *nil debet*, in an action of *debt* on bond, the demurrer book was made up by the plaintiff's attorney, and not by the clerk of the papers ^d. In all other cases, both by *bill* and

^a Co. Lit. 126. a.

Chap. XXX. p. 717, &c.

^b Tidd Prac. 9 Ed. 717. And as to the mode of making up, and entering the issue, before stat. 2 W. IV. c. 39. see *id.*

^c R. T. 12 W. III. (a.) K. B.

^d Herbert v. Taylor, 5 Barn. & C. 766.

8 Dowl. & R. 609. S. C.

original, in the King's Bench, the issue, or as it was commonly termed the *paper* book, or upon an issue in law the *demurrer* book, was made up by the clerk of the papers^a; who charged the plaintiff's attorney *eight pence per folio* for the whole book, and *four pence per folio* for all the pleadings subsequent to the declaration, of which the plaintiff's attorney furnished him with a copy. In the Common Pleas, the issue was in all cases made up by the plaintiff's attorney, or, in country causes, by his agent^b. But, by a general rule of all the courts^c, "the issue, or demurrer book, shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the court."

By whom now made up.

Formerly, when the plaintiff in his replication concluded to the country, or demurred, the issue, in the King's Bench, could not have been made up till a *four day* rule had been given and expired, to rejoin, or join in demurrer: but the practice in this respect was afterwards altered, and it was settled that in all special pleadings, where the plaintiff took issue upon the defendant's pleading, or traversed the same, or demurred, so as the defendant was not let in to allege any new matter, the plaintiff might make up the paper book, without giving a rule to rejoin^d; but otherwise a rule must have been given for that purpose, unless the defendant was bound by a judge's order to rejoin *gratis*. In the Common Pleas, when the plaintiff's replication concluded to the country, he could not regularly have made up the issue, without previously giving a *four day* rule to rejoin, unless the defendant were under terms of rejoining *gratis*^e. But, by a general rule of all the courts^f, "in all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed, without giving a rule to rejoin."

Making up issue, without giving rule to rejoin.

The issue contains an entry or transcript of the declaration, and other subsequent pleadings; and, in actions by *bill* in the King's Bench, it was formerly made up of the term in which it was joined^g; and was prefaced in that court with a *memorandum*, stating the exhibiting of the bill, and that there were pledges for the prosecution

Contents of, before stat. 2 W. IV. c. 39.

^a Callaghan v. Pennell, Say. Rep. 97; ut see Thompson v. Tiller, 2 Str. 1266.

^b Tidd Prac. 9 Ed. 717, 18.

^c R. Pr. H. 4 W. IV. reg. 5. 5 Barn. & Ad. Append. xiv. 10 Bing. 453. 2 Crompt. & M. 2; and see 3 Rep. C. L. Com. 28.

^d R. T. 1 Geo. II. (a.) K. B.

^e Tidd Prac. 9 Ed. 483. 718.

^f R. H. 2 W. IV. reg. I. § 106. 3 Barn. & Ad. 390. 8 Bing. 305. 2 Crompt. & J. 198.

^g Wood v. Miller, 3 East, 204.

of it^a. The reason for a *memorandum* was, that proceedings by *bill* were formerly considered as the bye business of the court^b; and it varied in *four* cases; 1st, when the issue was of the same term in which the cause of action accrued; secondly, when it was of a term subsequent to the cause of action, but of the same term with the declaration; thirdly, when it was of a term subsequent to the declaration, and within *four* terms after; fourthly, when it was more than *four* terms after the declaration. In the first case, the *memorandum* was special, stating the bill to have been exhibited on a particular day in term, after the cause of action accrued; in the second case, it stated the bill to have been exhibited on the first day of the term in which the declaration was delivered; in the third and fourth cases, it pursued the fact, but with this difference, that in the third case, the term of exhibiting the bill was referred to as *last* past; and in the fourth, as in a certain year of the king's reign^c. In actions by *original* in the King's Bench, the clerk of the papers made up the issue, or paper book, of the same term with the declaration^d; or it might have been entitled of the term issue was joined, as in actions by *bill*^e: and it began with a copy of the declaration, without a *memorandum*^f. In the Common Pleas, the issue was entitled of the term in which it was joined^g, and made up in the same manner as in the King's Bench by *original*. In the Exchequer, the issue began with a *placita* or stile of the court, of the term it was joined; and when the issue was of the same term with the declaration, it merely contained a transcript of the pleadings, after the *placita*, beginning each with a new line, without any *memorandum* or imparlance; but when the issue was of a subsequent term, a *memorandum* was prefixed to the declaration, and the entry of an imparlance to the plea^h.

Since that statute.

As the distinction, however, between proceedings by *bill* and *original* writ was abolished by the uniformity of process actⁱ, and a new and uniform mode of commencing declarations in personal actions was given by a rule of court^k made in pursuance thereof,

^a Append. to Tidd *Prac.* 9 Ed. Chap. XXX. § 1, &c. The pledges to prosecute, however, are now discontinued, in consequence of the rule of Mich. 3 W. IV. reg. 15. 9 Bing. 448. *Ante*, 122.

^b Gilb. C. P. 47.

^c 1 Wms. Saund. 5 Ed. 40. (1.) 2 Wms. Saund. 5 Ed. 1. (1.) and see Tidd *Prac.* 9 Ed. 718.

^d Imp. K. B. 10 Ed. 530.

^e *Id.* (a.) 279.

^f Append. to Tidd *Prac.* 9 Ed. Chap. XXX. § 3.

^g Imp. C. P. 7 Ed. §10. Append. to Tidd *Prac.* 9 Ed. Chap. XXX. § 5.

^h Append. to Tidd *Prac.* 9 Ed. Chap. XXX. § 6.

ⁱ *Ante*, 59.

^k R. M. 3 W. IV. reg. 15. 4 Barn. & Ad. 4, 5. 9 Bing. 447, 8. 1 Crompt. & M. 6, 7. *Ante*, 210.

and the proceedings were, in consequence of that act, no longer governed by terms, but might be carried on, except at certain times, in term or vacation^a, it became necessary to alter the form of the issue, so as to adapt it to the present state of the proceedings: And accordingly, it is now directed to be made up in the form given by the schedule annexed to the statutory rules of pleading^b, or to the like effect, *mutatis mutandis*: provided, that in case of non-compliance, the court or a judge may give leave to amend^b. This form is entitled, like the declaration, in the proper court, and of the day of the month and year on which it was filed or delivered; and begins by stating that the plaintiff complains of the defendant, who has been summoned to answer the plaintiff [*or arrested, or detained in custody*] by virtue [*or served with a copy*^c, *as the case may be,*] of a writ issued on — the — day of —, in the year of our Lord 18 —, (*date of first writ,*) out of the court of our lord the king, before the king himself at *Westminster*, [*or out of the court of our lord the king before his justices at Westminster, or out of the court of our lord the king, before the barons of his Exchequer at Westminster, (as the case may be,*) for that, &c. (*The declaration is then copied from these words, to the end, and afterwards the plea, and subsequent pleadings, to the joinder of issue, entitling each pleading of the day of the month and year when the same was pleaded; after which, when the issue is to be tried at nisi prius, it concludes with the award of the venire facias, as follows:*) Thereupon the sheriff is commanded, that he cause to come here on the — day of —^d, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.^e

When the issue is directed to be tried before the sheriff, &c. it concludes as follows: "And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.* hereupon, on the — day of —, in the year —,

Conclusion of, when issue is to be tried before sheriff, &c.

^a *Ante*, 132, 3.

^b R. Pt. H. 4 W. IV. Sched. No. 1.

^c Barn. & Ad. Append. x, xi. 10 Bing. 472, 3. 2 Crompt. & M. 25, 6. Append. Post, § 3.

^e This part of the form applies to cases where the defendant has not been summoned or arrested, but served with a copy of the writ of *capias*.

^d It should be observed, however, that by the statute 3 & 4 W. IV. c. 67. § 2. the *venire facias* is to be made returnable forthwith.

^e For the mode in which the *venire facias* was awarded previously to the above act, where there were several issues in fact, see Append. to Tidd *Prac.* 9 Ed. Ch. XXX. § 8; where there were several defendants, who pleaded separately, *id.* § 9; where there were several defendants, one of whom pleaded, and another let judgment go by default, *id.* § 12; where there were several issues, one triable by the country and another by the court, on *nisi tunc record*, *id.* § 14; and where there were several issues, in fact and in law, *id.* § 16.

(*teste of writ of trial,*) pursuant to the statute in that case made and provided, the sheriff (*or the judge of —, being a court of record, for the recovery of debt in the said county, as the case may be,*) is commanded, that he summon twelve, &c. who neither, &c. who shall be sworn truly to try the issue above joined between the parties aforesaid; and that he proceed to try such issue accordingly: and when the same shall have been tried, that he make known to the court here what shall have been done by virtue of the writ of our lord the king to him in that behalf directed, with the finding of the jury thereon indorsed, on the — day of —," &c. Where an issue had been delivered in the usual form, as for a trial at *nisi prius*, and the plaintiff subsequently obtained a judge's order to have the cause tried before the sheriff, and this order, with notice of trial, had been served, the court held, on motion to set aside the issue, that it was irregular, as it ought to have been made up in the form of an issue to be tried before the sheriff; and that it having been delivered before the judge's order was obtained, the plaintiff ought to have taken out a summons to amend the issue ^a.

Dates of pleadings to be inserted in.

In making up the issue, the dates of the pleadings are required by a late statutory rule ^b, to be inserted therein: And the omission to transcribe them into the issue delivered, constitutes a variance, of which the defendant is entitled to avail himself after trial, when the roll is made up, although the dates appear on the roll ^c. But the form of the action not being mentioned in the rule, it is no objection to an issue, that such form is not inserted therein ^d. The issue being made up, is delivered by the plaintiff's attorney, or in country causes by his agent in town, to the defendant's attorney, or his agent ^e. And the record of the issue, drawn up in conformity with the above rule, is conclusive evidence of the facts stated therein; and evidence on a trial to shew that a writ issued on a different day from that stated in the record, cannot be admitted ^f: The proper course would be to move to alter the record, at the expense of the plaintiff's attorney ^f.

Delivery of issue, &c.

^a Ward v. Peel, 1 Meeson & W. 743. Peel v. Ward, 5 Dowl. Rep. 169. 12 Leg. Obs. 281. S. C.

^b R. Pl. Gen. H. 4 W. IV. reg. I. 5 Barn. & Ad. Append. i. 10 Bing. 464. 2 Crompt. & M. 11.

^c Worthington v. Wigley, 5 Dowl. Rep. 209.

^d Ball v. Hamlet, 1 Crompt. M. & R.

575. 5 Tyr. Rep. 201. 3 Dowl. Rep. 188. S. C.; and see Fergusson v. Mitchell, 4 Dowl. Rep. 513. 1 Tyr. & G. 179. 1

Gale, 346. 2 Crompt. M. & R. 687. S. C.

^e Tidd Prac. 9 Ed. 725, 6.

^f Whipple (*or* Wippell) v. Manly, 1 Meeson & W. 432. 1 Tyr. & G. 672. 5 Dowl. Rep. 100. 12 Leg. Obs. 100, 101. S. C.

The proceedings in the action were formerly entered on different rolls, which, according to the subject matter of them, were denominated the *warrant of attorney* roll; the *process* roll; the *recognizance* roll; the *imparlance* roll; the *plea* roll; the *issue* roll; the *judgment* roll; the *scire facias* roll; and the roll of proceedings on writs of *error*, and *false judgment*: to which may be added, the rolls of *deeds*, and *awards*^a, &c. It was anciently the course of the King's Bench, to enter the *warrants of attorney* to prosecute or defend, on a particular roll kept for that purpose^b; but this course was altered in the time of *Wright*, Ch. J. who caused them to be entered on the top of the *issue* roll^c. In the Common Pleas, they were formerly entered by the clerk of the warrants, on distinct rolls, which were filed in the bundle of common rolls in that court^d. But, by a general rule of all the courts^e, "warrants of attorney to prosecute or defend, shall not be entered on distinct rolls, but on the top of the *issue* roll." And, by a subsequent rule of all the courts^f, "no entry shall be made on record, of any warrants of attorney to sue or defend." The entries of *process*^g, and *recognizances* of bail^h, have been already treated of in the eighth and twelfth Chapters.

Entry of proceedings in general, on what rolls.

Of warrants of attorney.

Of process, and recognizances of bail.

It was formerly usual to enter the declaration and other pleadings on rolls, as they occurred, in the different stages of the suit. If the plea was not of the same term, the declaration, in the Common Pleas, was entered on the *imparlance* roll; and in that, as well as in the other courts, when a plea came in, it was entered, after the declaration, on the *plea* roll, which, when issue was joined and entered thereon, was called the *issue* roll; and after the entry of final judgment, the *judgment* rollⁱ. After issue joined, the plaintiff must formerly have entered it on record, and proceeded to argument, if an issue in law, or to trial, if an issue in fact: and if he neglected to do so, the defendant, in the King's Bench, might have compelled him, by obtaining a rule from the Master^k, on the back of the issue, if delivered, entering it with the clerk of the rules, and serving a copy on the plaintiff's attorney. In the Common Pleas, the defendant's attorney obtained a side-bar or treasury rule from the se-

Of declarations, and other pleadings.

Of issues.

^a Tidd *Prac.* 9 Ed. 729, 30.

^b *Parson v. Gill*, 1 Salk. 88.

^c *Id. ibid.* R. E. 4 Jac. II. K. B.

^d Tidd *Prac.* 9 Ed. 95, 734.

^e R. H. 2 W. IV. reg. 1. § 1. 3 Barn. & Ad. 374. 8 Bing. 288. 2 Crompt. & J. 167.

^f R. Pl. Gen. H. 4 W. IV. reg. 4. 5 Barn. & Ad. Append. ii. 10 Bing.

464. 2 Crompt. & M. 12; and see 2 Rep. C. L. Com. 32.

^g *Ante*, Chap. VIII. p. 108, 9.

^h Chap. XII. p. 157, 8.

ⁱ As to the rolls of the different courts, and the entries thereon, see Tidd *Prac.* 9 Ed. 728, &c.

^k Append. to Tidd *Prac.* 9 Ed. Chap. XXX. § 41.

condaries, for the plaintiff's attorney to enter the issue on record, within *four* days after notice given^a, and served him with a copy thereof^b. In the Exchequer, there was no rule to enter the issue; but the plaintiff was bound to enter it upon the roll, when required by the defendant^c. And now, by a general rule of all the courts^e, "no entry of the issue shall be deemed necessary, to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by *proviso*."

Of proceedings
on record for
trial, or on judg-
ment roll.

By the late statutory rules of pleading, it is ordered, that "the entry of proceedings on the record for trial, or on the judgment roll, according to the nature of the case, shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatsoever^d; and that no fees shall be charged in respect of more than one issue, by any of the officers of the court, or of any judge at the assizes, or any other officer, in any action of *assumpsit*, or in any action of *debt* on simple contract, or in any action on the *case*."^d And it is also ordered thereby, that "every declaration, and other pleading, shall be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge^f; and that all judgments, whether interlocutory or final, shall be entered of record, of the day of the month and year, whether in term or vacation, when signed; and shall not have relation to any other day: provided, that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*."^g

Entry of con-
tinuances.

In entering the proceedings on the roll, they were formerly continued from term to term, or from one day to another in the same term^h, between the commencement of the suit and final judgment.

^a Append. to Tidd. Prac. 9 Ed. Chap. Chap. XXX. § 42.

^b Tidd Prac. 9 Ed. 727.

^c Dax. Ex. Pr. 70. 1 Burt. 227. 235. and see Coatsworth v. Martin, 2 Crompt. & J. 123. 1 Price, N. R. 172. 2 Tyr. Rep. 169. S. C.

^d R. H. 2 W. IV. reg. I. § 70. 3 Barn. & Ad. 384. 8 Bing. 298. 2 Crompt. & J. 187.

^e R. Pl. Gen. H. 4 W. IV. reg. 15, 16. 5 Barn. & Ad. Append. vi. 10 Bing.

468. 2 Crompt. & M. 18; and see 2 Rep. C. L. Com. 31.

^f R. Pl. Gen. H. 4 W. IV. reg. 1. 5 Barn. & Ad. Append. i. 10 Bing. 464. 2 Crompt. & M. 11.

^g *Id.* reg. 3. And as to the entry of judgments by default, see Tidd Prac. 9 Ed. 569, 70; and of judgments after verdict, &c. *id.* 931, 2; and of judgments *nunc pro tunc*, *id.* 932, 3.

^h Martin v. Wyvill, 1 Str. 492. Wynne v. Wynne, 1 Wils. 40; and see Taylor v.

And if there were any lapse, or want of continuance, that was not aided, the parties were out of court, and the plaintiff must have begun *de novo*. Before declaration, there was, properly speaking, no continuance^a; though the parties, by consent, might have obtained a day before declaration which was called a *die datus prece partium*^b. After declaration and before issue joined, the proceedings were continued by imparlance; after issue joined and before verdict, by *vicecomes non misit breve*; and after verdict or demurrer, by *curia advisari vult*. In the King's Bench, there was formerly no imparlance roll; and the practice in that court was never to enter continuances till the plea roll was made up, though the declaration were of *four* or *five* terms standing^c: and after plea pleaded, though the plaintiff had day to reply for several terms, yet no mention was necessary to be made on the roll, of any imparlance or continuance^d. In the Common Pleas, when an *original* was actually issued in the first instance, (which however was seldom the case,) or the proceedings were by *bill* filed against an attorney, or member of the House of Commons, if the defendant were entitled to an imparlance, it was formerly entered on a roll, called the *imparlance* roll, which was made up of the term the original writ was returnable, or bill filed; and contained an entry of the declaration or bill, and of the defendant's appearance thereto, with the prayer and grant of an imparlance^e. But now, by a general rule of all the courts^f, "it shall not be necessary that imparlances should be entered on any distinct roll." And it is ordered, by a late statutory rule of pleading^g, that "no entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*^h, which is to be retained: Provided, that such regulation shall not alter or affect any existing rules of practice, as to the times of proceeding in the cause: Provided also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable in *banc*, or at *nisi prius*, the same defence

Before declaration.

After declaration, issue, verdict, or demurrer.

Entry of continuances abolished.

Not to alter times of proceeding.

Pleas after last pleading, &c. how pleaded.

Gregory, 2 Barn. & Ad. 257. Com. Dig. tit. *Pleader*, V. Tidd *Prac.* 9 Ed. 678, 9.

^a Gilb. C. P. 40.

^b Clapham v. Lenthall, Hardr. 365. Gilb. C. P. 41, 2; and see *Doc. Pl.* 222.

^c *Curlius (or Curlewis) v. Padley*, (or *Dudley*), 1 Salk. 179. 2 Ld. Raym. 672. S. C.

^d *Wymark's case*, 5 Co. 75. *Mellor v. Walker*, 2 Wms. Saund. 5 Ed. 1. c. (2.) and see Tidd *Prac.* 9 Ed. 678, 9. 720.

^e *Dyke v. Sweeting*, 1 Wils. 183; and see Tidd *Prac.* 9 Ed. 720.

^f R. H. 2 W. IV. reg. I. § 109. 3 Barn. & Ad. 390. 8 Bing. 305. 2 Crompt. & J. 198.

^g R. Pl. Gen. H. 4 W. IV. reg. 2. 5 Barn. & Ad. Append. ii. 10 Bing. 464. 2 Crompt. & M. 11; and see 2 Rep. C. L. Com. 31, 2.

^h Tidd *Prac.* 9 Ed. 775. 917, 18.

Affidavit to
accompany.

may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be^a: Provided also, that no such plea shall be allowed, unless accompanied by an *affidavit*, that the matter thereof arose within *eight* days next before the pleading of such plea, or unless the court or a judge shall otherwise order.”^a

Entry of con-
tinuance after
judgment by de-
fault, unneces-
sary.

After judgment by default, and a writ of inquiry awarded, there was formerly no subsequent continuance between the parties, in the Common Pleas^b: In the King’s Bench, it was otherwise^c: But now, by a general rule of all the courts^d, “after judgment by default, the entry of any subsequent continuances shall not be required.”

^a As to pleas *puis darrein continuance*, and the time and manner of pleading them, see Tidd *Prac.* 9 Ed. 647, &c.

Rol. Abr. 486. pl. 7.

^c Tidd *Prac.* 9 Ed. 678.

^b Sir John Heydon’s case, 11 Co. 6. b. Harrington v. Launsdon, Yelv. 97. 1

^d R. H. 2 W. IV. reg. I. § 106. 3 Barn. & Ad. 890. 8 Bing. 304. 2 Crompt. & J. 198.

CHAP. XXXI.

Of PROCEEDING to ARGUMENT on DEMURRER.

AFTER joinder in demurrer, the demurrer-book should in general be made up and delivered by the plaintiff's attorney, or his agent, to the defendant's attorney or agent^a. And it must, we have seen^b, on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the court^c. But it does not seem to be necessary for the defendant to return the demurrer book; and therefore a judgment signed in *scire facias* for not returning it, was set aside for irregularity^d. It was formerly the practice to enter the proceedings on record, and carry in and docket the roll, before the demurrer was argued^e; but this seems to be now unnecessary, in consequence of a late statutory rule^f, by which it is ordered, that "the entry of proceedings on the record for trial, or on the judgment roll, according to the nature of the case, shall be the first entry of the proceedings in the cause, or of any part thereof, upon record."

Demurrer book.

By whom made up.

Entry of proceedings on record unnecessary, before argument.

It being found that great expense was often unnecessarily incurred, in making up demurrer books, from setting forth those parts of the pleadings to which the demurrers did not apply, a rule was made in the King's Bench^g, that "when there shall be a demurrer to part only of the declaration, or other subsequent pleadings, those parts only of the declaration and pleadings, to which such demurrer relates, shall be copied into the demurrer books; and if any other parts shall be copied, the master shall not allow the costs thereof on taxation, either as between party and party, or as between attorney and client:" and there is a similar rule in the Common Pleas^h, and Exchequerⁱ.

Making up demurrer books for judges, when part only of declaration, &c. is demurred to.

^a R. T. 1 Geo. II. (a.) K. B. Sharpe v. Sharpe, Barnes, 163. C. P.; and for the mode of proceeding, when there are several issues, in law and in fact, see Tidd *Prac.* 9 Ed. 736, 7.

^b *Ante*, 441.

^c R. Pr. H. 4 W. IV. reg. 5. 5 Barn. & Ad. Append. xiv. 10 Bing. 453. 2 Crompt. & M. 2.

^d Baylis v. Hayward, 3 Dowl. Rep. 533. 10 Leg. Obs. 11, 12. S. C.

^e *Ante*, 445.

^f R. Pl. Gen. H. 4 W. IV. reg. 15. 5 Barn. & Ad. Append. vi. 10 Bing. 468. 2 Crompt. & M. 18. *Ante*, 446.

^g R. H. 8 & 9 Geo. IV. K. B. 7 Barn. & C. 642.

^h R. H. 8 & 9 Geo. IV. C. P. 1 Moore & P. 401. 4 Bing. 549, 50.

ⁱ R. M. 9 Geo. IV. Excheq. 2 Younge & J. 530; and see Tidd *Prac.* 9 Ed. 739.

Motion and rule
for *concilium*, in
K. B.

In C. P.

In Exchequer.

The *concilium, dies concilii*, or day to hear the counsel of both parties ^a, was formerly moved for in the King's Bench, upon reading the record in court ^b; but it afterwards became a motion of course, which only required a counsel's signature. Still, however, the record was taken *pro forma* to the clerk of the papers, who marked it "*read*," and signed the initials of his name on the brief or motion paper; which being carried to the clerk of the rules, he drew up the rule for a *concilium* thereon ^c, which was a *four* day rule; and then the cause was entered for argument with the clerk of the papers ^d. In the Common Pleas, the record was brought into court by the clerk of the dockets, on moving for a *concilium*; which was a motion of course, requiring only a serjeant's name: and the motion paper being handed to one of the secondaries, he marked the roll as "*read*" in course; after which, the rule was drawn up with the secondary, and a copy of it served on the defendant's attorney; and at the time of drawing up the rule, the secondary set down the cause for argument in the court book. In the Exchequer, the rule for a *concilium* was a *four* day rule: and where a demurrer was seriously intended to be argued, the court would not grant the rule ^e, nor hear any argument on the demurrer ^f, on the last day of term; but where a sham plea was pleaded, and a demurrer to a replication appeared to have been filed for delay, the court, when there were not *four* days remaining of the term, would grant a *concilium* for the last day of it ^g. And where it appeared that the defendant had demurred to the plaintiff's replication for delay, the court refused to set aside an order for a *concilium*, although *four* days had not been given to the defendant to return the demurrer book ^h. By a late regulation of that court, it was declared that in future it should not be necessary to give a rule to bring in demurrer books, but the motion for a *concilium* might be made without it ⁱ: And, by a subsequent rule of all the courts ^k,

^a R. E. 2 Jac. II. K. B.

^b *Id.* 2 Lil. P. R. 421.

^c Append. to Tidd *Prac.* 9 Ed. Ch. XXXI. § 1.

^d R. T. 1 Geo. II. (a.) K. B.

^e *Thellusson v. Baillie*, 2 Anstr. 499.

^f *Milner v. Horton*, M'Clel. 493.

^g *Gent v. Vandermoolen*, 13 Price, 247; and see *Harrison v. Richardson*, 1 M'Clel. & Y. 246. *Cooper v. Hawkes*, 1 Crompt. & J. 219. *Wilson v. Tucker*, 1 Crompt. & M. 795. 2 Dowl. Rep. 83. 3 Tyr. Rep. 938. 6 Leg. Obs. 460, 61. S. C.

^h *Savile v. Jackson*, 11 Price, 337.

And see further, as to the motion and rule for a *concilium* in K. B. Tidd *Prac.* 9 Ed. 737, 8.; in C. P. *id.* 738, 9.; and in the Exchequer, *id.* 739, 40.

ⁱ R. T. 1 W. IV. Excheq. Price Ex. Pr. 538. 1 Tyr. Rep. 519. 1 Crompt. & J. 468. 1 Dowl. Rep. 294. 2 Leg. Obs. 79.

^k R. Pr. H. 4 W. IV. reg. 6. 5 Barn. & Ad. Append. xiv. 10 Bing. 453. 2 Crompt. & M. 2; and see 3 Rep. C. L. Com. 28.

"no motion or rule for a *concilium* shall be required; but demurrers, as well as all special cases, and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas, upon payment of a fee of *one* shilling; and notice thereof shall be given forthwith by such party to the opposite party."

No longer necessary.

Previously to the day appointed for argument, copies of the demurrer books were formerly delivered in the King's Bench, by the plaintiff or his attorney, to the chief justice and *senior* judge, and by the defendant or his attorney, to the two other judges; and if either party, or his attorney, neglected to deliver the books, the other party, or his attorney, ought to have delivered the same^a. In the Common Pleas it was a rule, that the plaintiff's attorney should deliver all the demurrer books to the lord chief justice, and the rest of the judges^b; which books, by a later rule^c, were to be delivered to the lord chief justice and the other judges, *two* days exclusive of the day of such delivery, before the day on which the cause was set down for argument. In the Exchequer, it was declared by a rule of court^d, that it would be sufficient to deliver the books to the barons, *two* days before the day of argument: But now, by a general rule of all the courts^e, it is ordered, that "*four* clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the lord chief justice of the King's Bench or Common Pleas, or lord chief baron, as the case may be, and the *senior* judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard, until he shall have paid for such copies, or deposited with the clerk of the rules of the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may

Delivery of demurrer books to judges, in K. B.

In C. P.

In Exchequer.

In all the courts.

^a R. M. 17 Car. 1. K. B.; and see R. M. 11 Geo. 1. 1 Burt. 199. Man. Ex. Pr. 304. Rex v. Forman, 11 Price, 161. Commelin v. Thompson, 1 Crompt. & J. 461. 1 Tyr. Rep. 346. S. C. Excheq.

^b R. M. 6 Geo. II. reg. III. C. P.; and see R. E. 27 Car. II. C. P.

^c R. M. 49 Geo. III. C. P. 1 Taunt. 412.

^d R. T. 1 W. IV. Excheq. Price Ex. Pr. 538. 1 Tyr. Rep. 519. 1 Crompt. &

J. 468. 1 Dowl. Rep. 294. 2 Leg. Obs. 79; and see further, as to the delivery of demurrer books to the judges, in K. B. Tidd *Prac.* 9 Ed. 738; in C. P. *id.* 739; and in the Exchequer, *id.* 739, 40.

^e R. Pr. H. 4 W. IV. reg. 7. 5 Barn. & Ad. Append. xiv, xv. 10 Bing. 453, 4. 2 Crompt. & M. 2, 3; and see Vernon v. Hodgins, 1 Tyr. & G. 427. 1 Gale, 384. S. C.

Decisions there-
on.

be, a sufficient sum to pay for such copies." On this rule it has been determined, in the King's Bench, that if a party seek to make his opponent pay the cost of copies of demurrer books, he must deliver them on the day after the time for his opponent's delivering them expires ^a: And an *affidavit*, stating the omission, by one of the parties, to deliver two copies of the demurrer book to the judges, whereupon the adverse party delivered such copies, for which he has not been paid, will not entitle him to object to the adverse party's being heard, unless notice has been given of the intention to make such objection, so as to give such party an opportunity of answering the affidavit ^b. In the Exchequer, the demurrer books ought not to be delivered on *Saturday* evening, when the argument is to take place on *Monday* ^c: And in that court, where the defendants having demurred to a replication, the plaintiff entered the cause in the paper for argument, and the defendant accordingly came prepared to argue, but it could not be heard in consequence of there being no joinder in demurrer, nor the demurrer books delivered to the judges, the court, under these circumstances, refused to allow the defendant his costs of the day ^d. If all the demurrer books are not delivered to the judges, by one party or the other, the case will be struck out of the special paper ^e. But where the defendant has neglected to deliver his demurrer books, and does not appear at the argument to support his pleadings, but has offered to give a *cognovit*, the court will give judgment for the plaintiff, without requiring the delivery of the defendant's demurrer books ^f. And the court refused to allow a plaintiff to strike a demurrer out of the paper, on the ground of the bankruptcy of the defendant ^g.

Exceptions to
be marked in
margin, in K. B.

In the King's Bench it is a rule ^h, that "in all books to be delivered to the judges, the exceptions intended to be insisted upon in argument should be marked by the party who objects to the pleadings, in the margin of the books he delivers": And he should leave a copy of such exceptions, with the two judges to whom he does not deliver books ⁱ. In the Common Pleas, the exceptions intended to be in-

In C. P.

^a Fisher v. Snow, 3 Dowl. Rep. 27.

^b Sandall v. Bennett, 4 Nev. & M. 89.
2 Ad. & E. 204. S. C.

^c Darker v. Darker, 2 Dowl. Rep. 88.
6 Leg. Obs. 206. S. C.

^d Howorth (or Howarth) v. Hubbersty,
3 Dowl. Rep. 457. 5 Tyr. Rep. 391. 9
Leg. Obs. 429. S. C.

^e Abraham (or Abram) v. Cook, 3
Dowl. Rep. 215. 9 Leg. Obs. 237. S. C.
per Parke, B.

^f Scott v. Robson, 2 Crompt. M. & R.

29. 5 Tyr. Rep. 717. S. C. As to the
judgment on demurrer, for the plaintiff or
defendant, see Tidd Prac. 9 Ed. 740, 41.

^g Flight v. Glossop, 4 Dowl. Rep. 135.
1 Hodges, 222. S. C.

^h R. E. 2 Jac. II. K. B. revived by
R. H. 38 Geo. III. K. B.

ⁱ Appleton v. Binks, 1 Smith R. 361,
2. per Lawrence, J.; and see Tidd Prac.
9 Ed. 738.

sisted upon in argument should also, as in the King's Bench, be marked in the margin of the books, or on separate paper; and if each party take objections to the pleadings of the other, it is said to be the duty of each to deliver books, with the points intended to be made on both sides, stated in the margin^a. This practice is enforced by several rules of court^b; by the last of which it is ordered, that "in all special arguments in this court, notice in writing of the points which are intended to be insisted upon by each of the parties, be delivered to the judges at their chambers, *two* days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the judges, or on separate paper; and that each of the parties do, within the same time, leave a copy of such notice at the chambers of the Lord Chief Justice, to be delivered to the adverse party, upon his application." On this rule, where either party has neglected to mark the points intended for argument, the court will not allow the case to be argued, but will give judgment against the party guilty of the neglect^c. And where the plaintiff, on demurrer to a replication, had neglected to give such notice, the court would not allow him to attack the defendant's plea, though they permitted him to offer arguments in support of his replication^d. In the Exchequer, where the defendant demurs to any pleading of the plaintiff, and the court overrules the demurrer, the defendant is at liberty to object to any of the previous pleadings of the plaintiff, if the objection be stated in the margin of the paper books, but otherwise not^e. After argument, and judgment for the plaintiff on a special demurrer, the court will not allow the defendant to withdraw his demurrer, and plead or rejoin issuably, without an *affidavit* distinctly shewing a ground of defence upon the merits^f.

In Exchequer.

Withdrawing
demurrer, after
argument.

^a *Clarke v. Davies*, 7 Taunt. 72, 3; and see *Tidd Prac.* 9 Ed. 739.

^b R. H. 48 Geo. III. C. P. 1 Taunt. 203. R. T. 11 Geo. IV. C. P. 4 Moore & P. 621. 6 Bing. 802.

^c *Grottick v. Phillips*, 3 Moore & S. 135. 9 Bing. 721. S. C.; and see *Brogden*

v. Marriott, 2 Scott, 708, 9.

^d *Bayley v. Homan*, 3 Scott, 384.

^e *Darling v. Gurney*, 2 Dowl. Rep. 101.

^f *Bramah v. Roberts*, 1 Scott, 364. 1 Bing. N. R. 481. S. C.; and see *Tidd Prac.* 9 Ed. 71ⁿ, 11.

CHAP. XXXII.

Of the ISSUE, and TRIAL by the RECORD.

Nul tiel record,
issue on.

Proceedings on
plea of judgment
recovered,
&c. in same
court.

THE issue we are now speaking of, arises upon a plea or replication of *nul tiel record*. When a judgment, or other matter of record, in the same court is pleaded, the plaintiff, instead of replying *nul tiel record*, may crave *oyer* of the record pleaded, or at least a note in writing of the term and number roll; and if it be not given him in convenient time, he may sign judgment. This practice was originally confined to pleas in abatement^a, but was afterwards extended to pleas in bar^b: and accordingly it is now settled, that wherever a judgment, or other matter of record, in the same court is pleaded, the party pleading it must, on demand, give a note in writing of the term and number roll, whereon such judgment or matter of record is entered and filed, or in default thereof the plea is not to be received^c.

In another court.

And, by a general rule of all the courts^d, "where a defendant shall plead a plea of judgment recovered in *another* court, he shall in the margin of such plea, state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea: and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge." This rule does not apply to a plea by an executor, of

^a Anon. Keilw. 95, 6. Theobald v. Long, Carth. 453. 1 Ld. Raym. 347. S. C. Creamer v. Wicket, Carth. 517. 1 Ld. Raym. 550. S. C. Wilson v. Ingoldsby, 2 Ld. Raym. 1179.

^b Hunter v. Wiseman, 2 Str. 623.

^c R. T. 5 & 6 Geo. II. (b.) K. B. Imp. C. P. 7 Ed. 292, 3; and see Tidd Prac. 9 Ed. 742.

^d R. Pr. H. 4 W. IV. reg. 8. 5 Barn. & Ad. Append. xv. 10 Bing. 454. 2 Crompt. & M. S. Tidd Prac. 9 Ed. 742, 3.

judgments recovered against the testator, whereby the assets are absorbed ^a.

To a cognizance for the arrears of an annuity, the plaintiff pleaded that a memorial of the deed, by which the annuity was granted, containing the names of all the witnesses, &c. and the consideration for granting the same, was not enrolled in the court of Chancery; the defendants replied that a memorial of the deed was enrolled, and after setting out the memorial at length, concluded with a *prout patet per recordum* and verification thereon, which the court held to be sufficient, on demurrer alleging that the conclusion should have been to the country ^b. And where, to *debt* on a recognizance of bail, the defendant pleaded that no *capias ad satisfaciendum* issued, to which the plaintiff replied that a *capias ad satisfaciendum* did issue, directed to the sheriffs of *London*, and the defendant rejoined that the original action was brought in *Middlesex*, and not in *London*, which the plaintiff denied in his surrejoinder, and concluded with a verification by the record, the court held, on special demurrer, that the conclusion was proper ^c.

Conclusion of replication, &c. with a *prout patet per recordum*.

Upon a plea in abatement of another action pending in another court for the same cause, concluding with a *prout patet per recordum*, it is sufficient to satisfy the plea, if a record of a writ be produced ^d: But where the plaintiff issued two writs, one out of the Common Pleas, which was never served, and the other out of the Exchequer, on which he proceeded to declare; and the defendant pleaded to the action in the Exchequer, another action pending for the same cause in the Common Pleas; the plaintiff replied *nul tiel record*, and served the defendant with a rule to produce; and the defendant having made up a roll from the *præcipe* on the file of the Common Pleas, that court ordered it to be cancelled, with costs ^e. And where a defendant, who had been sued in the Common Pleas, signed judgment of *non pros*, after which the plaintiff proceeded against him in another action for the same cause in the King's Bench, the latter court would not permit him to abandon his judgment of *non pros*, and plead the pendency of the former action in the Common Pleas ^f.

Evidence on issue of *autre action pendent*, &c.

^a *Power v. Izod*, (or *Fry*), 1 Scott, 119.
1 Bing. N. R. 304. 3 Dowl. Rep. 140.
S. C.

^b *Richardson v. Tomkies*, 9 Bing. 51.
2 Moore & S. 56. S. C.

^c *Darling v. Gurney*, 2 Dowl. Rep. 101.
And as to the manner of concluding pleas
and replications of *nul tiel record*, see

Tidd Prac. 9 Ed. 742, 3.

^d *Kerbey* (or *Kirby*) *v. Siggers*, 2 Dowl.
Rep. 659. *per Parke*, B.

^e *Same v. Same*, 4 Moore & S. 481. 2
Dowl. Rep. 813. S. C.; and see *Tidd*
Prac. 9 Ed. 745.

^f *Pepper v. Whalley*, 3 Dowl. Rep.
579. 10 Leg. Obs. 74, 5. S. C.

Judgment on
plea of *nul tiel*
record, &c.

Upon a plea of *nul tiel record* to a declaration in *scire facias* in the Exchequer, on a judgment obtained in the court of Great Sessions for *Wales*, before the passing of the administration of justice act ^a, the plaintiff was entitled to the judgment of the court, upon producing the certificate and affidavit of the record being in the hands of the officer, in pursuance of the rules of *Mich.* 1 W. IV. though the actual judgment was not in court ^b. And where, in *debt* on a recognizance of bail, the declaration stated the recognizance to have been entered into in an action of *debt* against *J. S.* and on the production of the record, on a plea of *nul tiel record*, it appeared that the original action was on *promises*, the court allowed the declaration to be amended, on payment of costs, but required a special application for that purpose ^c.

^a 11 Geo. IV. & 1 W. IV. c. 70.

569. 4 Dowl. Rep. 139. S. C.; and see

^b Howell v. Brown, 3 Dowl. Rep. 806.

Engleheart v. Eyre, 5 Barn. & Ad. 68. 2

^c Munkenbeck v. Bushnell, 1 Scott,

Nev. & M. 849. S. C.

CHAP. XXXIII.

Of TRIALS by the COUNTRY, at BAR or NISI PRIUS; and of the STEPS preparatory to the latter, and CONSEQUENCES of not proceeding to TRIAL: and of the TRIAL of ISSUES before the SHERIFF, &c.

TRIALS by the country are either at *bar*, or *nisi prius*^a; or, by the law amendment act^b, before the sheriff, or judge of a court of record for recovery of debt, where the sum sought to be recovered, and indorsed on the writ of *summons*, does not exceed *twenty* pounds.

Trials at bar, or
nisi prius, &c.

When the crown is immediately concerned, the attorney-general has a right to demand a trial at bar^c: and a trial at bar will be granted, on the *ex officio* application of the attorney-general, where the interest of the king, as Duke of *Lancaster*, may come into question^d. If a trial at bar be directed by any of the courts of King's Bench, Common Pleas, or Exchequer, it is provided by the statute 11 Geo. IV. & 1 W. IV. c. 70. § 7. that "it shall be competent to the judges of such court, to appoint such day or days for the trial thereof, as they shall think fit; and the time so appointed, if in vacation, shall, for the purpose of such trial, be deemed and taken to be a part of the preceding term."

When crown is
concerned.

Days to be ap-
pointed for trial
at bar.

In the Common Pleas, it was formerly a rule, that the plaintiff's attorney must, before the *essoign* day of the term in which the cause was appointed to be tried at bar, give notice to the chief prothonotary, or his secondary, of the day of trial, that the same might be put down in the court book provided for that purpose; and in case of

Notice of trial
at bar, to officer
of court.

^a As to trials at *bar*, see *Tidd Prac.* 9 Ed. 747; and as to trials at *nisi prius*, and the steps preparatory thereto, and consequences of not proceeding to trial, &c. see *id.* 751, &c.

^b 3 & 4 W. IV. c. 42.

^c F. N. B. 241. *A.* 2 Inst. 424.

Anonymous, 1 Vent. 74. *Ld. Bellamont's case*, 2 Salk. 625. Sir Samuel

Astrey's case, *id.* 651. 6 Mod. 123. S. C. *Rex v. Foley*, 1 Str. 52. *Rex v. Johnson*, *id.* 644. *Rex v. Hales*, 2 Str. 816. 1 Barnard. K. B. 88. S. C. *Rowe v. Brenton*, 8 Barn. & C. 737. 3 Man. & R. 133. S. C.; and see *Tidd Prac.* 9 Ed. 748.

^d *Brown v. Ld. Granville*, 1 Har. & W. 270.

neglect, the cause could not have been tried that term without motion, and special direction of the court ^a: and, by a general rule of all the courts ^b, "notice of a trial at bar shall be given to the proper officer of the court, before giving notice of trial to the party."

Trials at *nisi prius*, in what county.

Trials at *nisi prius* should regularly be had in the county where the venue is laid, and where the fact was, or is supposed to have been committed ^c, except in case of the king, who by his prerogative may try his cause in what county he pleases ^d, or where the venue is laid in *Berwick-upon-Tweed* ^e, &c. or in a county where an impartial trial cannot be had, in which latter cases the cause is tried in *Middlesex*, or in the next adjoining county ^f.

In *Wales*, at common law.

In *Wales*, trials at *nisi prius* were formerly had in the next English county: and *Herefordshire* was considered as the next *English* county to *South Wales*, and *Shropshire* to *North Wales* ^g. But now, by the administration of justice act ^h, it is enacted, "that assizes shall be held for the trial and dispatch of all matters, criminal and civil, within the county of *Chester*, and the several counties and county towns in the principality of *Wales*, under and by virtue of commissions of assize, *oyer* and *terminer*, gaol delivery, and other writs and commissions, to be issued in like manner and form as had been usual for the counties in *England*; and all laws and statutes then in force relating to the execution of such commissions, when issued for counties in *England*, shall extend and be applied to the execution of the commissions issued for the county of *Chester*, and the counties of *Wales*, under the authority of that act. And, until it shall be otherwise provided by law, one of the two judges appointed to hold the sessions of assizes, under his Majesty's commission, within the county of *Chester*, and principality of *Wales*, shall, in such order, and at such times as they shall appoint, proceed to hold such assizes, at the several places where the same have theretofore been most usually held within *South Wales*; and the other of such judges shall proceed to hold such assizes, at the several places where the same have theretofore been most usually held in *North*

In *Chester* and *Wales*, by administration of justice act.

^a R. H. 9 Ann. reg. I. C. P.; and see *Tidd Prac.* 9 Ed. 750.

^b R. H. 2 W. IV. reg. I. § 60. 3 Barn. & Ad. 382. 6 Bing. 296. 2 Crompt. & J. 185.

^c *Rex v. Harris*, 3 Bur. 1334.

^d West, on Extents, 216; and see *Attorney-General v. Parsons*, 2 Meeson & W. 23. 5 Dowl. Rep. 165. 12 Leg.

Oba. 898. S. C.

^e *Rex v. Cowle*, 2 Bur. 859. 2 Ken. 519. S. C.

^f *Tidd Prac.* 9 Ed. 723, 4, 5.

^g *Goodright d. Richards v. Williams*, 2 Maule & S. 270; and see *Ambrose v. Rees*, 11 East, 370.

^h 11 Geo. IV. & 1 W. IV. c. 70. § 19.

"*Wales*; and both of such judges shall hold the assizes in and for the county of *Chester*, in like manner as in other counties in *England*."*

In the Exchequer of Pleas, there was formerly but one sitting day in term for *London*, and one for *Middlesex*^b. But, by a general rule of that court^c, it is ordered that "there shall be *two* days appointed for the trials of causes at *nisi prius* in term in *London*, and the like in *Middlesex*, to be named by the Lord Chief Baron of that court, previous to the commencement of each term; and that, on such nomination, the said Lord Chief Baron shall also appoint the hour at which the court will sit on each of those days." In pursuance of this rule; the days appointed for sittings in term in *London* are on the *sixth*, and last day but two in the term; in *Middlesex*, they are on the *seventh*, and last day but one in the term^d. After term, it is a rule that "the sitting day at *nisi prius*, at the *Guildhall* in and for the city of *London*, shall be the *second* day after every term; and such sitting shall be adjourned until such day as the court shall then direct."* In *Middlesex*, the day of sitting is the *seventh* day after the term^e.

Sitting days for *London* and *Middlesex*, in Exchequer.

In country causes, the notice of trial, in the King's Bench, must formerly have been given to the agent in town^f. In the Common Pleas, it might have been given either to the agent in town, or to the attorney in the country^h, except where it was given on the back of the issue; in which case, as the issue must have been deliveredⁱ, so the notice of trial must of necessity have been given to the agent in town^k: But, by a general rule of all the courts^l, "notice of trial shall be given in town."

Notice of trial, to whom given, in country causes.

In the Exchequer of Pleas, all notices of trial given by the attornies or side clerks of the office of pleas, in causes instituted there, were formerly required to be entered in the book of orders kept in such office, and a written notice of such entries left at the seat in the said office, of the attorney or clerk in court concerned for the defendant, or at his chambers or place of residence^m: But now, by a

In Exchequer.

* *Id.* § 20.

^b Dax Pr. 1 Ed. 81.

^c R. M. 1 W. IV. reg. II. § 14. 1 Crompt. & J. 281. 1 Tyr. Rep. 162, 3.; and see R. E. 49 Geo. III. in *Scac. Man. Ex. Append.* 226. 8 Price, 507.

^d Dax Pr. 82; and see 1 Crompt. & J. 261. (b.)

^e R. H. 1 W. IV. Excheq. 1 Crompt. & J. 386. 1 Tyr. Rep. 292.

^f Dax Pr. 82. 1 Crompt. & J. 281. (b.) and see Tidd *Prac.* 9 Ed. 753.

^g *Hayes v. Perkins*, 3 East, 568.

^h *Tashburn v. Havelock*, Barnes, 306.

ⁱ *Mountstephen v. Templer*, Cas. Pr. C. P. 94.

^k Tidd *Prac.* 9 Ed. 97, 753, 4.

^l R. H. 2 W. IV. reg. I. § 57. 3 Barn. & Ad. 381. 8 Bing. 296. 2 Crompt. & J. 183.

^m R. H. 39 Geo. III. Excheq. Man. Ex. Append. 223, 4. 8 Price, 503; and see Tidd *Prac.* 9 Ed. 754.

rule of that court^a, all notices are required to be given by and to the attornies in the cause.

For sittings
in *London* and
Middlesex.

By another rule of the Exchequer of Pleas^b, it is ordered that "all notices of trial, in causes on the plea side of the court, for the sittings after term in *London* and *Middlesex*, shall, in case the defendant or defendants reside at a less distance from the cities of *London* or *Westminster* than *forty* miles, be given *eight* days before the day appointed by the Lord Chief Baron, for the trial of the same causes; and in case the defendant or defendants reside *forty* miles or upwards therefrom, then such notices of trial shall be given *fourteen* days before such day appointed by the Lord Chief Baron as aforesaid; one day being considered *inclusive*, and the other *exclusive*." This rule, however, was altered, as to notices of trial for the *adjournment* day in *London*, by a subsequent rule^c; by which it is ordered, that "in every notice of trial thereafter to be given for the sittings after any term, to be holden at the *Guildhall* aforesaid, it shall be specified whether the cause is intended to be tried on the first day of such sittings, or at the adjournment day; and that in every case in which such notice shall specify that the cause is to be tried at the adjournment day, it shall be sufficient to give such notice *eight* days before the *first* day of the sittings after term, if the defendant or defendants reside above *forty* miles from the said city of *London*; and *four* days before the said first day, if the defendant or defendants reside within that distance."

For adjourn-
ment day in
London.

Term's notice,
when necessary,
and when not.

Upon an *old* issue, or, in other words, when there have been no proceedings for *four* terms exclusive, or as it seems, in the King's Bench, for a *year* after issue joined, a term's notice of the plaintiff's intention to proceed is requisite; which notice must formerly have been given before the *essoign* day of the *fifth*, or other subsequent term^d. But, by a general rule of all the courts^e, "where a term's notice of trial is required, such notice may be given at any time before the first day of term." A term's notice, however, is not necessary, before motion, for costs of the day^f. Short notice of trial, in *country* causes, must formerly have been given, in the King's Bench, *four* days at least before the commission day, one *exclusive* and the other *inclu-*

Short notice of
trial, in country
causes.

^a R. M. 1 W. IV. reg. II. § 7. 1
Crompt. & J. 277. 1 Tyr. Rep. 159.

^b R. E. 56 Geo. III. in Scac. Man.
Ex. Append. 227. 4 Price, 4.; and see
Tidd Prac. 9 Ed. 755.

^c R. H. 1 W. IV. 1 Crompt. & J. 386,
1 Tyr. Rep. 292.

^d Tidd Prac. 9 Ed. 756.

^e R. H. 2 W. IV. reg. 1. § 52. 3 Barn.
& Ad. 381. 8 Bing. 295. 2 Crompt. & J.
182.

^f French v. Burton, 2 Crompt. & J.
634. •

sive ^a: In the Common Pleas, *two* days' notice seems to have been sufficient ^b: But, by a general rule of all the courts ^c, "the expression 'short notice of trial' shall, in country causes, be taken to mean *four* days." On this rule it has been holden, that short notice of trial, in country causes, means in all cases *four* days peremptorily ^d: and if, from the state of the pleadings, the parties cannot get to trial without less notice being sufficient, they ought to make that the terms of the order ^d.

The countermand of notice of trial might formerly have been given either to the attorney in the *country*, or to the agent in *town* ^e: And accordingly, by a general rule of all the courts ^f, "countermand of notice of trial may be given either in town or country, unless otherwise ordered by the court or a judge." And, in a country cause, countermand of notice of trial may be given by the country attorney, although the agent in town is the attorney on the record ^g. By the statute 14 Geo. II. c. 17. § 5, the countermand of notice of trial at the assizes, or in a town cause where the defendant lives above *forty* miles from *London*, must be given *six* days at least before the intended trial: In other cases, *two* days' notice of countermand is still sufficient, the day of countermand being one, *exclusive* of the commission day, or day of sittings ^h: And accordingly, by a general rule of all the courts ⁱ, "in country causes, or where the defendant resides more than *forty* miles from town, a countermand of notice of trial shall be given *six* days before the time mentioned in the notice for trial, unless short notice of trial has been given:" and, by another rule ^k, "in *town* causes, where the defendant lives within *forty* miles of town, *two* days' notice of countermand shall be deemed sufficient."

Countermand of notice of trial, where given.

When given.

If the plaintiff give notice of trial, and do not proceed accordingly, he cannot in general take the cause down to trial again, without new

New notice of trial, when

^a R. E. 30 Geo. III. K. B. 3 Durnf. & E. 660.

^b Hood v. Darby, Pr. Reg. 390. Butler v. Johnson, Barnes, 301; and see Tidd Prac. 9 Ed. 472. 756, 7.

^c R. H. 2 W. IV. reg. I. § 58. 3 Barn. & Ad. 381. 8 Bing. 296. 2 Crompt. & J. 184.

^d Lawson v. Robinson, 1 Crompt. & M. 499. 3 Tyr. Rep. 490. 2 Dowl. Rep. 69. S. C.; and see further as to short notice of trial in *country* causes, Pounds v. Penfold, 5 Nev. & M. 186. 1 Har. & W. 323. S. C.

^e Mendapace v. Humphreys, 2 Str. 1073. Gerry v. Shilston, Cas. Pr. C. P.

48, 9. Goodright d. Hawkey v. Hoblyn, *id.* 120. Pr. Reg. 393. Barnes, 296. S. C. Tashburn v. Havelock, *id.* 306; and see Tidd Prac. 9 Ed. 97. 757.

^f R. H. 2 W. IV. reg. I. § 57. 3 Barn. & Ad. 381. 8 Bing. 296. 2 Crompt. & J. 583.

^g Cheslyn v. Pearce, 1 Meeson & W. 56. 1 Tyr. & G. 238. 1 Gale, 423. 4 Dowl. Rep. 693. S. C.

^h Tidd Prac. 9 Ed. 757.

ⁱ R. H. 2 W. IV. reg. I. § 61. 3 Barn. & Ad. 382. 8 Bing. 297. 2 Crompt. & J. 185.

^k *Id.* § 62. 3 Barn. & Ad. 382. 8 Bing. 297. 2 Crompt. & J. 185.

necessary, and
when not

Notice of trial
by continuance,
&c.

Trial by *provisio*.

notice ^a, to be given as before, unless by consent, or rule of court ^b. But if notice of trial be given for a day certain in *London* or *Middlesex*, and the plaintiff be not ready to proceed, the cause may be tried at the next sitting ^c, upon giving *two days'* previous notice, one inclusive and the other exclusive; which is called a notice of trial by *continuance* ^d. This notice must be given the same length of time before the notice of trial expires, as in the case of a notice of countermand ^e: and if *Sunday* intervene, there must be *two* clear days' notice, exclusive of that day ^f: but a continuance of notice of trial on *Friday* for *Monday*, is sufficient ^g. A notice of trial in due time, according to the practice of the court, is regular, although a previous notice has been given which is void, and has not been countermanded ^h.

Before the defendant could have had a trial by *provisio*, the issue must formerly have been entered of record; and therefore, unless this were done, the practice was for the defendant to obtain a rule from the master, which was entered with the clerk of the rules in the King's Bench, or a side-bar or treasury rule from the secondaries in the Common Pleas, for the plaintiff to enter the issue; and if it were not entered, he might have signed a *nonpros* ⁱ: But, by a general rule of all the courts ^k, "no entry of the issue shall be deemed necessary, to entitle a defendant to take the cause down to trial by *provisio*." Formerly, if the plaintiff had been guilty of *laches*, the defendant, in the King's Bench, might have procured a rule from the master, for a trial by *provisio* ^l; which must have been entered with the clerk of the rules, and might have been had after giving notice of trial ^m: But a rule for this purpose was not necessary in the Common Pleas ⁿ:

^a Append. to Tidd *Prac.* 9 Ed. Chap. XXXIII. § 8; and see *Spriggs v. Rutherford*, 2 Dowl. Rep. 429. 6 Leg. Obs. 28, 9. S. C.

^b R. M. 1654. § 18. K. B. R. M. 1654. § 21. C. P. Append. to Tidd *Prac.* 9 Ed. Chap. XXXIII. § 12.

^c R. M. 4 Ann. (c.) K. B. R. M. 1654. § 21. *Smith v. Hoff*, Barnes, 301. C. P.

^d Append. to Tidd *Prac.* 9 Ed. Chap. XXXIII. § 9; and see Tidd *Prac.* 9 Ed. 757, 8.

^e *Forbes v. Crow*, 1 Meeson & W. 465.

^f *Grojean v. Manning*, 2 Tyr. Rep. 725. 2 Crompt. & J. 635. S. C.; and see 3 Tyr. Rep. 820. (b.) *Wardle v. Ackland*,

3 Tyr. Rep. 819. 2 Dowl. Rep. 28. S. C.

^g *Stewart v. Abraham*, 2 Dowl. Rep. 709. *per Alderson*, B.

^h *Fell v. Tyne*, 5 Dowl. Rep. 246; and see *Ranger v. Bligh*, *id.* 235.

ⁱ 2 Lil. P. R. 84. 87. 612. 615. 617. Anon. 3 Salk. 362, 3. R. M. 4 Ann. (c.). K. B. Diggs *v.* Price, Barnes, 313. C. P.; and see Tidd *Prac.* 9 Ed. 760, 61.

^k R. H. 2 W. IV. reg. I. § 70. 3 Barn. & Ad. 384. 8 Bing. 298. 2 Crompt. & J. 187.

^l *Dodson v. Taylor*, 2 Str. 1055.

^m *King v. Pipet*, 1 Durnf. & E. 695.

ⁿ *Imp. C. P.* 6 Ed. 333. (a.); and see Tidd *Prac.* 9 Ed. 483. 761.

And now, by a general rule of all the courts ^a, "no rule for a trial by *proviso* shall be necessary." Rule for, unnecessary.

In the Common Pleas, if no notice of trial had been given, the defendant could not formerly have tried the cause by *proviso* the same term, in *London* or *Middlesex*; but afterwards he might have taken it by *proviso*, according to law ^b: and where notice of trial had been given, it was not necessary that a whole term should intervene, before the cause was tried by *proviso*; but it might have been so tried in the next term after notice of trial ^c: And now, by a general rule of all the courts ^d, "no trial by *proviso* shall be allowed, in the same term in which the default of the plaintiff has been made." When such trial may be had.

The course and practice of the court referred to by the statute 14 Geo. II. c. 17, is that which before regulated the trial by *proviso*; and as the defendant could not have had such trial, until after the issue was entered of record ^e, and the plaintiff had been guilty of *laches* ^f, so neither till then was he entitled to judgment as in case of *nonsuit* ^g: But, by a general rule of all the courts ^h, "no entry of the issue shall be deemed necessary, to entitle a defendant to move for judgment as in case of a nonsuit." This rule has not, it seems, made any alteration in the time for moving for judgment as in case of a nonsuit; but the time remains exactly as it was before ⁱ; the only effect of the rule being to save the necessity of entering the issue ^h. And where the defendant had unnecessarily misled the plaintiff to enter the issue, it was holden that this would not prevent his afterwards moving for judgment as in case of a nonsuit ⁱ. Entry of issue unnecessary, for judgment as in case of nonsuit.

In the King's Bench ^k, and Exchequer ^l, the defendant might formerly have moved the court for costs for not proceeding to trial, and Motion for costs for not proceeding to trial, and

^a R. H. 2 W. IV. reg. 1. § 71. 3 Barn. & Ad. 384. 8 Bing. 298. 2 Crompt. & J. 188.

^b R. M. 1654. § 21. C. P.

^c Williams v. Jones, Barnes, 295. Cas. Pr. C. P. 101. Pr. Reg. 397. S. C.; and see Tidd Proc. 9 Ed. 761.

^d R. H. 2 W. IV. reg. I. § 71. 3 Barn. & Ad. 384. 8 Bing. 298. 2 Crompt. & J. 188.

^e Ante, 462.

^f Diggs v. Price, Barnes, 313; and see Tidd Proc. 9 Ed. 764.

^g R. H. 2 W. IV. reg. I. § 70. 3 Barn. & Ad. 384. 8 Bing. 298. 2 Crompt. & J. 187.

^h Williams v. Edwards, 8 Dowl. Rep. 183, 4. 1 Crompt. M. & R. 583. 5 Tyr. Rep. 177. S. C. per Parke, B.

ⁱ Sarjeant (or Sargeant) v. Jones, 2 Dowl. Rep. 420. 7 Leg. Obs. 253. S. C. per Littledale, J.

^k Triands v. Goldsmith, 1 Bos. & P. 39. (a.); and see Morgan v. Bidgood, 1 Price, 61, 2. Mimham (or Lingham) v. Langhorn, 7 Taunt. 476. 1 Moore, 251. S. C.

^l Law v. Travis, Wightw. 65. Morgan v. Bidgood, 1 Price, 61. Fisher v. Hodgkinson, 2 Price, 90. Hockin v. Reid, (or Dockett v. Reed,) 1 Crompt. & J. 466. 1 Tyr. Rep. 386. S. C.

judgment as in
case of nonsuit.

afterwards for judgment as in case of a nonsuit; and it was a rule of the King's Bench, not to give costs, unless a separate motion was made for them: but he could not have moved for judgment as in case of a nonsuit, and costs for not proceeding to trial, at the same time ^a; nor, after moving for the former, was he in general allowed to apply for the latter ^b. In the Common Pleas, a defendant, who moved for costs for not proceeding to trial, could not have judgment as in case of a nonsuit, for the *same* default, either in the same or a subsequent term ^c; though it seems he might have had such judgment, after the issue was entered, for a *subsequent* default ^d: and, after moving for judgment as in case of a nonsuit, he was not allowed to move for costs for not proceeding to trial ^e. The defendant therefore, in that court, must have made his election, either to move for costs for not proceeding to trial, or for judgment as in case of a nonsuit: and in practice, it was usual for him to move for the latter; upon which, if the court, on shewing cause, granted further time to the plaintiff, it was generally on the condition of his paying costs for not proceeding to trial ^f. And now, by a general rule of all the courts ^g, "no motion for judgment as in case of a nonsuit shall be allowed, after a motion for costs for not proceeding to trial, for the *same* default; but such costs may be moved for separately, (*i. e.*) without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of: or the court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs for not proceeding to trial; but the payment of such costs shall not be made a condition of discharging the rule." Under the above rule, it was deemed irregular to move for judgment as in case of nonsuit, after a motion for costs of the day for not proceeding to trial, for the same default, though the motion for such costs was made before the rule came into operation ^h. But if, after a motion for the costs of the day, for not proceeding to trial, the plaintiff suffers another term to elapse, without giving notice of trial, that has been considered as a new default, which entitles a defendant to move in the next term, for judgment as

By rule of *Hil.*
2 W. IV.

^a *Earl of Leicester v. Wooden*, M. 21 Geo. II. K. B.

^b *Hullock on Costs*, 2 Ed. 406.

^c *Ogle v. Moffit*, Barnes, 316. *Clarke v. Simpson*, 4 Taunt. 591.

^d *Clarke v. Simpson*, 4 Taunt. 591.

^e *Id. ibid.* *Mimham (or Lingham) v. Langhorn*, 7 Taunt. 476. 1 Moore, 251. S. C.

^f *Jordaine v. Sharpe*, 2 H. Blac. 280.

Jolliffe v. Morris, 1 Bos. & P. 38. *Clarke v. Simpson*, 4 Taunt. 592. (*a.*); and see *Tidd Prac.* 9 Ed. 759. 769.

^g R. H. 2 W. IV reg. I. § 69. 3 Barn. & Ad. 383, 4. 8 Bing. 298. 2 Crompt. & J. 187.

^h *Omardon v. Snelling*, 1 Dowl. Rep. 373. 4 Leg. Obs. 413. S. C. *per Taunton*, J.; and see *Palgrave v. Justin*, 1 Har. & W. 368.

in case of a nonsuit^a. So, in a *country* cause, where the plaintiff makes default in not proceeding to trial at the assizes pursuant to his notice, and the defendant, in the next term, without moving for judgment as in case of a nonsuit, merely applies for costs for not proceeding to trial, and the plaintiff again makes default, by not giving notice of trial for the next assizes, the defendant has been holden to be entitled to move for such judgment^b. This rule, however, does not enable the court, where a rule for judgment as in case of a nonsuit for not proceeding to trial^c is made absolute, to grant the defendant the costs of the day, on disposing of that motion^c. In the Exchequer, on a motion for costs for not proceeding to trial, the plaintiff is not excused by an offer to refer the cause, made after the commission day^d.

If a *pauper* give notice of trial, and do not proceed, or be otherwise guilty of improper conduct, the court, we have seen^e, will order him to be dispaupered, and until this were done, they would not formerly have made any rule about costs: But, by a general rule of all the courts^f, "where a *pauper* omits to proceed to trial pursuant to notice or an undertaking, he may be called upon by a rule to shew cause, why he should not pay costs, though he has not been dispaupered."

Pauper may be called upon to pay costs for not proceeding to trial, though not dispaupered.

Previously to the law amendment act^g, trials by the country were at *bar*, or *nisi prius* only: But now, by the above act^h, it is enacted, that "in any action depending in any of the superior courts of common law "at *Westminster*, for any debt or demand in which the sum sought to "be recovered, and indorsed on the writ of *summons*, shall not exceed "twenty pounds, it shall be lawful for the court in which such suit shall "be depending, or any judge of any of the said courts, if such court "or judge shall be satisfied that the trial will not involve any difficult "question of fact or law, and such court or judge shall think fit so to "do, to order and direct that the issue or issues joined shall be tried "before the sheriff of the county where the action is brought, or any "judge of any court of record for the recovery of debt in such "county; and for that purpose a writ shall issue, directed to such sheriffⁱ,

Trial of issues before sheriff, &c. by law amendment act.

^a Dyke v. Edwards, 2 Dowl. Rep. 53.

^e *Ante*, 241.

^b Hyde v. Gardner, 1 Dowl. Rep. 380.

^f R. H. 2 W. IV. reg. I. § 110. 3 Barn. & Ad. 390. 8 Bing. 305. 2 Crompt. & J. 199.

Roberts v. Richards, 4 Leg. Obs. 283.

S. C. *per* Taunton, J.; but see Moseley v. Clark, 2 Dowl. Rep. 66. *semb. contra*.

^g 3 & 4 W. IV. c. 42.

^c Johnson v. Smith, 1 Dowl. Rep. 421.

^h § 17.

4 Leg. Obs. 267. S. C. *per* Taunton, J.

ⁱ The words "or judge" seem to have been here accidentally omitted, 4 Moore & S. 172, 3. *per* Tindal, Ch. J.

^d Eaton v. Shuckburgh, 2 Dowl. Rep. 624. 9 Leg. Obs. 28. S. C. Excheq.

"commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues." And there is a similar clause in the late act, for improving the practice and proceedings in the court of Common Pleas of the county palatine of *Lancaster* ^a.

Construction of act, and decisions thereon.

The provisions of the law amendment act, respecting the trial of issues before the sheriff, &c. are confined to actions for the recovery of debts or demands, in which the sum sought to be recovered, and indorsed on the writ of *summons*, does not exceed 20*l*. It therefore applies only to actions for debts and pecuniary demands, for sums not exceeding that amount, and not to actions of *tort* ^b. And it was determined in one case ^c, that the court or a judge has no power to reduce the amount indorsed upon a writ of *summons*, so as to make the cause triable by the sheriff. But it was afterwards holden, that where a cause is proper to be tried by the sheriff, under the writ of trial act, but by mistake a larger sum is indorsed on the writ than the plaintiff claims, and than is allowed by the act, the court will allow the writ to be amended ^d. And it seems that the court will not set aside a trial before the sheriff, on the ground that the case was not within the statute, at the instance of the party who obtained the order for the writ of trial ^e. The application for a writ of trial may be made either to a judge at chambers, or to the court: and it seems that when an application has been made to a judge at chambers, who has refused to make the order, the court will not entertain the application, although the party might, under the act, have come before the court in the first instance ^f.

Rule or order for trial of issues, and how obtained.

In pursuance of the above act, if the court in which the suit is depending, or any judge of a superior court, is satisfied upon hearing counsel, or the attornies or agents for both parties, that the sum sought to be recovered does not exceed *twenty* pounds, and that the trial will not involve any difficult question of fact or law, they will make a rule

^a 4 & 5 W. IV. c. 62. § 20.

^b *Watson v. Abbot*, 2 *Crompt. & M.* 150. 4 *Tyr. Rep.* 64. 2 *Dowl. Rep.* 215. S. C.; but see *Price v. Morgan*, 2 *Meeson & W.* 53.

^c *Trotter v. Bass*, 1 *Scott*, 403. 1 *Bing. N. R.* 516. 3 *Dowl. Rep.* 407. 1 *Hodges*, 23. 9 *Leg. Obs.* 414. S. C.; and see *Edge v. Shaw*, 4 *Dowl. Rep.* 189. 2

Crompt. M. & R. 415. S. C.

^d *Edge v. Shaw*, 4 *Dowl. Rep.* 189. 2 *Crompt. M. & R.* 415. S. C. *Frodsham v. Round*, 4 *Dowl. Rep.* 569. 1 *Har. & W.* 667. 11 *Leg. Obs.* 323, 4. S. C. *per Patteson, J.*

^e *Price v. Morgan*, 2 *Meeson & W.* 53.

^f *Davies v. Lloyd*, 1 *Tyr. & G.* 28. 4 *Dowl. Rep.* 478. S. C.

or order for trial of the issue or issues joined therein, before the sheriff of the county where the action is brought, or any judge of a court of record for the recovery of debt in such county; and that a writ issue, directed to such sheriff or judge, for trial thereof accordingly. An *affidavit* is sometimes required by the court or a judge, in support of the application for a rule or order for a writ of trial ^a; but it is commonly granted, without an *affidavit*, by summons and order ^b at a judge's chambers. The writ of trial is directed to the judge of the court of record in those places in which there is a court of record, and to the sheriff where there is no such court ^c: And where a writ of trial was directed to the mayor of *Colchester*, and the cause was tried by his deputy, the court refused to set aside the proceedings, on a suggestion that the cause ought to have been tried by the mayor himself; it not appearing that the officer had no authority to appoint a deputy ^c. This writ begins by stating that the plaintiff had impleaded the defendant, in the court from which it issued, in an action on promises, (or of *debt*, &c. *as the case may be*;) and after setting forth the declaration, plea, and issue or issues joined, and that the sum sought to be recovered, and indorsed on the writ of *summons*, does not exceed 20*l.* and that it is fitting that the issue or issues should be tried before the sheriff or judge to whom it is directed, commands the said sheriff or judge, that he summon twelve free and lawful men, duly qualified according to law, who are in no wise akin to the plaintiff or to the defendant, who shall be sworn truly to try the issue or issues joined between the parties, and that he proceed to try such issue or issues accordingly; and when the same shall have been tried in manner aforesaid, that he make known to the court what shall have been done by virtue of the writ, with the finding of the jury thereon indorsed, on the return day ^d.

Direction and form of writ of trial.

The writ of trial is engrossed on parchment; and, by a general rule of all the courts ^e, "shall be sealed only, and not signed." This writ is issued in like manner as the writ of inquiry in ordinary cases ^f; and should be delivered to the sheriff, *two* clear days at least before the time appointed for its execution, folded up, and indorsed with a statement of the court in which the action is brought, the names of the

Sealing and issuing writ, and proceedings thereon.

^a For the form of this *affidavit*, when necessary, see Append. to Tidd *Sup.* 1833, p. 307.

^b *Id.* 307. *b.*

^c *Clark v. Marnar*, 4 Moore & S. 171. 2 Dowl. Rep. 774. S. C.

^d For the form of the writ of trial, see

R. Pl. H. 4 W. IV. Sched. No. 5. Append. Post, § 5.; and see Append. to Tidd *Sup.* 1833, p. 308.

^e R. Pr. H. 4 W. IV. reg. 19. 5 Barn. & Ad. Append. xvii. 10 Bing. 456. 2 Crompt. & M. 6.

^f *Ante*, 297.

parties, nature of the writ, and time and place when and where the issues are to be tried, specifying the hour of the sitting of the court precisely ^a; and the sheriff will thereupon summon a jury, for the execution of the writ; and the parties should *subpoena* their witnesses, and prepare for trial. In causes to be tried before the sheriff, &c. the issue must, however, be previously made up and delivered, as in other cases ^b. The *form* of the issue (which is set forth in the schedule annexed to the statutory rules of pleading ^c), is similar to that where the cause is to be tried at *nisi prius*, to the end of the pleadings; after which it concludes with the award of the writ of trial, as stated in a former chapter ^d: And if the issue has been made up and delivered before the order for trial, an order should be obtained for its amendment ^e. The *notice* of trial ^f (which should be such a notice as the defendant would have been entitled to, in case the issue or issues were to be tried before a judge at *nisi prius* ^g), states the time and place when and where, and before whom, they are to be tried; and should state the hour of the sitting of the court precisely, as indorsed on the writ; and, before it is given, the hour should be settled at the sheriff's office, to prevent the inconvenience of detaining the jury for a considerable time, with the uncertainty of the appearance of the parties: But if a notice of trial be given for a day not fixed for trying issues, it is a nullity, and no ground for moving to set it aside ^h. If either party propose to attend by counsel in the sheriff's court of *London*, or other court of record, he should give notice thereof to his adversary, or he will not be allowed for it in costs.

If the plaintiff do not proceed to trial in due time, the defendant may move for judgment as in case of a nonsuit, as well where the issue is directed to be tried before the sheriff, as where it comes on at the sittings or assizes ⁱ. This motion is made in the same manner, and governed by the same principles, as the motion for judgment as in case of a nonsuit in ordinary cases ^k: And therefore, where notice of trial has been given, the defendant may move for judgment as in case

Issue.

Form of.

Notice of trial, &c.

Judgment as in case of nonsuit.

^a Append. to Tidd *Sup.* 1833, p. 309.

^b Arden v. Garry, 2 Scott, 188.

^c R. Pl. H. 4 W. IV. Sched. No. 4. Append. Post, § 4.

^d Chap. XXX. *Ante*, 443, 4.

^e Peel v. Ward, 5 Dowl. Rep. 169. 12 Leg. Obs. 231. Ward v. Peel, 1 Meeson & W. 743. S. C. *Ante*, 444.

^f Append. to Tidd *Sup.* 1833, p. 309.

^g As to this notice, see Tidd *Prac.* 9 Ed. 753, &c.

^h Arden v. Garry, 2 Scott, 188.

ⁱ Begbie v. Grenville, 2 Dowl. Rep. 298; and see Walls (or Halls) v. Redmayne, 2 Dowl. Rep. 508. 8 Leg. Obs. 331. S. C. *per* Taunton, J. Horwood v. Roberts, 2 Dowl. Rep. 534. 9 Leg. Obs. 30. S. C. Maddeley (or Madely) v. Batty, 3 Dowl. Rep. 205. 9 Leg. Obs. 110. S. C.

^k Ward v. Krank, 9 Leg. Obs. 251. *per* Patteson, J.

of a nonsuit, in a *town* cause, the next term after issue joined ^a; or, in a *country* cause, the next term after the first assizes ^b. But the motion can in no case be made the same term in which issue is joined ^c: and unless notice of trial has been given, it cannot be made in a *town* cause, until the second term after issue joined ^d, nor, in a *country* cause, till the next term after the second assizes ^e. Where issue was joined on the 22d *July*, and the defendant took out a summons, calling on plaintiff to try before the sheriff in a fortnight, and a judge granted an order accordingly, the court held first, that the judge had no power to make such an order; secondly, that a motion for judgment as in case of a nonsuit in *Michaelmas* term, was premature; and lastly, that that motion having been made on the faith of a judge's order, which was overturned by the decision of the court, the rule for judgment as in case of a nonsuit should be discharged, without costs ^f. And where a peremptory undertaking is given, on discharging a rule for judgment as in case of a nonsuit, the court will require the plaintiff to proceed to trial in a reasonable time, to be regulated by the practice of the sheriff's court ^g. It seems that the under-sheriff, under the writ of trial act, has no power to postpone the trial of a cause; but the application must be made to a judge ^h: and where it was made to the under-sheriff, after the jury were sworn, on the ground of the absence of a material witness, and refused, the court would only grant a new trial on payment of costs ^h. If a new trial from the sheriff's court has been granted, at the instance of the plaintiff, who afterwards neglects to retry the cause, the defendant must take down the record by *proviso* ⁱ.

Putting off trial.

Trial by proviso.

^a *Walls (or Halls) v. Redmayne*, 2 Dowl. Rep. 508. 8 Leg. Obs. 331. S. C. *per Taunton*, J. *Mullins v. Bishop*, 2 Dowl. Rep. 557. 8 Leg. Obs. 428. S. C. *Maddeley (or Madely) v. Batty*, 3 Dowl. Rep. 205. 9 Leg. Obs. 110. S. C.

^b *Horwood v. Roberts*, 2 Dowl. Rep. 534. 9 Leg. Obs. 30. S. C. *Banks v. Wright*, 3 Dowl. Rep. 14. 9 Leg. Obs. 206. S. C. *Ward v. Krank*, 9 Leg. Obs. 251. *per Patteson*, J.

^c *Begbie v. Grenville*, 2 Dowl. Rep. 258. *per Bayley*, B.

^d *Horwood v. Roberts*, 2 Dowl. Rep. 534.

^e *Butterworth v. Crabtree*, 3 Dowl. Rep. 184. 1 Crompt. M. & R. 519. 5 Tyr.

Rep. 149. S. C. *per Parke*, B. *Harle v. Wilson*, 1 Gale, 139. 3 Dowl. Rep. 658. 10 Leg. Obs. 222. S. C.

^f *Wright v. Skinner*, 1 Tyr. & G. 69. 2 Crompt. M. & R. 746. 4 Dowl. Rep. 727. 12 Leg. Obs. 157. S. C.

^g *Mullins v. Bishop*, 2 Dowl. Rep. 557. 8 Leg. Obs. 428. S. C. *per Patteson*, J. *Banks v. Wright*, 3 Dowl. Rep. 14. 9 Leg. Obs. 206. S. C. *per Littledale*, J.; and see *Williams v. Edwards*, 3 Dowl. Rep. 660. 10 Leg. Obs. 222. S. C.

^h *Packham v. Newman*, 3 Dowl. Rep. 165. 5 Tyr. Rep. 215. 1 Crompt. M. & R. 584. 9 Leg. Obs. 173. S. C.

ⁱ *Corone v. Garment*, 1 Hodges, 74. *Day v. Day*, 1 Meeson & W. 39. 1

- Nonsuit.** On a writ of trial, the sheriff has the same power of directing a
Verdict. *nonsuit*, as a judge at *nisi prius* in an ordinary case^a. And the verdict of a jury, on trial of the issue or issues, is declared by the act^b to be "as valid, and of the like force, as a verdict of a jury at *nisi prius*; and the sheriff or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers, with respect to amendment on such trial, as are thereafter given to judges at *nisi prius*." An under-sheriff is holden to be justified in laying down a rule, that no person but a barrister, or an attorney, shall appear as the advocate of a party, on a writ of trial^c.
- Powers of sheriff, &c. as to amendment on trial.** On the return day of the writ of trial, the sheriff is required thereby, to make known to the court, what he shall have done by virtue thereof, with the finding of the jury thereon indorsed^d, that judgment may be given thereupon^e. And at the return of such writ, the act directs that "costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff, deputy, or judge, before whom such trial shall be had, shall certify^f under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court for a new trial, or a judge of any of the said courts shall think fit to order^g that judgment or execution shall be stayed, until a day to be named in such order."^h And there is a similar clause in the late act, for improving the practice and proceedings in the court of Common Pleas of the county palatine of *Lancaster*ⁱ.
- Return to writ of trial.** Where a certificate is granted by the sheriff or judge before whom the trial is had, or a judge's order obtained for staying judgment or execution, the unsuccessful party may move the court above to set aside a nonsuit or verdict, and have a new trial; or, with the permission of the judge before whom the cause was tried, but not otherwise^k, to set aside the verdict, and enter a nonsuit^k. But the absence of a witness is no ground for a new trial^l: the application ought to be made to postpone the trial^l. And the non-production of a pro-
- Proceedings thereon.**
- New trial.**
- Tyr. & G. 314. 1 Gale, 403. 4 Dowl. Rep. 740. S. C.
^a Watson v. Abbot, 2 Crompt. & M. 150.
⁴ Tyr. Rep. 64. 2 Dowl. Rep. 215. S. C.
^b Stat. 3 & 4 W. IV. c. 42. § 18.
^c Tribe v. Wingfield, 2 Meeson & W. 128.
^d For the form of the indorsement of a nonsuit or verdict, on the writ of trial, see R. P. H. 4 W. IV. Sched. No. 6, 7. Append. Post, § 6, 7; and see Append. to Tidd Sup. 1833, p. 310.
^e Ante, 467.
^f Append. to Tidd Sup. 1833, p. 300.
^g Id. ib.
^h Stat. 3 & 4 W. IV. c. 42. § 18.
ⁱ 4 & 5 W. IV. c. 62. § 21.
^j Ricketts v. Burman, (or Bird,) 4 Dowl. Rep. 578. 11 Leg. Obs. 259. S. C.
^k Edwards v. Dignam, 2 Dowl. Rep. 642; and see Henning v. Samuel, 2 Dowl. Rep. 766. 3 Moore & S. 818. S. C.

missory note at a trial before the secondary, where the action is brought upon it, is no ground for moving for a new trial, unless the objection to its non-production was taken at the time ^a. The rule which forbids a motion for a new trial, when the amount is under 20*l*. except for mis-direction of the judge, does not apply to trials before the sheriff, under the writ of trial act ^b. It is a rule, however, that no new trial will be granted on the ground of the verdict being against evidence, where the verdict is for less than 5*l*. ^c But where, in an action tried under a writ of trial, upon a promissory note for two guineas, in which the requisites of the statute 17 Geo. III. c. 30. had not been complied with, the under-sheriff directed the jury to find for the defendant, and the jury on bringing in their verdict said 'we find that the money is due, but there is an informality in the note,' the court held, that if the verdict were not so clear that it could be entered for the defendant, it amounted to a perverse verdict; and a new trial was granted, although the sum was under 5*l*. ^d Where an action was tried before the sheriff, under the above act, and the jury gave 20*l*. for the debt, and 10*s*. for interest, it seemed that the verdict was bad, *quoad* the 10*s*. ^e But where, upon the trial of an issue before the sheriff, in an action of *debt* on bond, a variance appeared between the bond as stated in the declaration and the bond produced in evidence, the penalty in one being 260*l*. and in the other 200*l*. but the sheriff refused to nonsuit, and the plaintiff obtained a verdict, the court refused a rule for a new trial on the ground of the variance, though no amendment had been made, nor the facts found specially, as directed by the 24th section of the act ^f.

In order to move for a new trial of a cause tried before the sheriff, Motion for. the party applying should in general produce a copy of the under-sheriff's notes, verified by *affidavit* ^g; or an *affidavit* stating a refusal by the under-sheriff to give a copy of his notes, and bringing before the court the facts proved at the trial ^h; and also, in cases where no

^a *Henn (or Hann) v. Neck*, 3 Dowl. Rep. 163. 9 Leg. Obs. 173. S. C.; and for decisions on writs of trial, see *id.* 242.

^b *Taylor v. Helps*, 5 Barn. & Ad. 1068. *Edwards v. Dignam*, 2 Dowl. Rep. 642; but see *Henning v. Samuel*, 3 Moore & S. 818. 2 Dowl. Rep. 766. S. C. *semb. contra.*

^c *Packham v. Newman*, 1 Crompt. M. & R. 585. 5 Tyr. Rep. 215. S. C.

^d *Owen v. Pugh*, 1 Tyr. & G. 26.

^e *Burleigh v. Kingdom*, 2 Dowl. Rep. 351. 2 Crompt. & M. 476. 4 Tyr. Rep. 369. S. C.

^f *Hill v. Salter, (or Salt)* 2 Dowl. Rep. 380. 2 Crompt. & M. 420. 4 Tyr. Rep. 271. S. C.

^g *Hall v. Middleton*, 4 Nev. & M. 368. 1 Har. & W. 7. S. C.; and see *Johnson v. Wells*, 2 Dowl. Rep. 352. 2 Crompt. & M. 428. 4 Tyr. Rep. 270. 7 Leg. Obs. 334. S. C. *Hellings v. Stevens*, 4 Tyr.

counsel has been retained to conduct the cause, or defence, in the court below, an *affidavit* setting forth the cause or nature of the application^a. The *affidavit*, verifying the sheriff's notes, need only state that the paper annexed contains the notes sent by the sheriff to the court^b: and it is not necessary, on applying for a new trial, to state the pleadings in the affidavits; for the writ of trial, like the *postea* in an action which has been tried before a judge, is assumed to be in court^c. If the motion be made by counsel engaged at the trial, the court, under special circumstances, will not require the production of the sheriff's notes^d: and where they have been delivered to one of the judges, neither party is entitled to them, for the purpose of making a motion for a new trial^e. All motions to set aside verdicts obtained in causes tried before sheriffs, or judges of inferior courts of record, pursuant to the above statute, shall come on for hearing as motions in the ordinary course, and not be set down in the new trial paper^f. The sheriff's notes, however, need not be filed^g: and where they were produced on moving for a new trial, but the rule was drawn up on reading the *affidavit* only, and not on reading the sheriff's notes, it was holden to be sufficient, in order to save expense; for if that course had not been adopted, the opposite party must have taken office copies of the notes^h. In a case tried before the sheriff, the court refused to allow a motion for a new trial, after the *fourth* day of the term, though the sheriff's notes had not been received until the *fifth* day, when the motion was madeⁱ. And where a new trial is moved for, on the under-sheriff's notes, on the ground of the absence of evidence to warrant the verdict of the jury, it is not competent for the other party to use affidavits^k. If the under-

Rep. 270, 71. 1001. *Mansfield v. Brearey*, 320. 4 Dowl. Rep. 373. 11 Leg. Obs. 1 Ad. & E. 347. 3 Nev. & M. 471. 452. S. C.

S. C. *Burney v. Mawson*, (or *Moxal*), ^d *Barnett v. Glossop*, 3 Dowl. Rep. 1 Ad. & E. 348. (a.) 3 Nev. & M. 472. 625.

(a.) S. C. 4 Moore & S. 484, 5. *Grainge* ^e *Vickers v. Cock*, 3 Dowl. Rep. 492.

v. Shoppee, (or *Strapper*), 2 Dowl. Rep. ^f *Resolution of the Judges*, 4 Moore & 644. 4 Tyr. Rep. 1000. 8 Leg. Obs. 477. S. 485.

S. C. *Thomas v. Edwards*, 1 Crompt. ^g *Mansfield v. Brearey*, 1 Ad. & E. 347. M. & R. 382. *Muppin v. Gillatt*, 4 3 Nev. & M. 471. S. C.

Dowl. Rep. 190. 10 Leg. Obs. 382. S. C. ^h *Stephens v. Pell*, (or *Tell*), 2 Dowl. Rep. 629. 2 Crompt. & M. 710. 9 Leg.

^a *Resolution of the Judges*, 4 Moore & S. 485. Obs. 28, 9. S. C. *per Parke*, B.

^b *Hellings v. Stevens*, 4 Tyr. Rep. ⁱ *Anon.* 1 Har. & W. 146. 1001.

^c *Milligan v. Thomas*, 1 Tyr. & G. ^k *Jones v. Howell*, 4 Dowl. Rep. 176; 134. 2 Crompt. M. & R. 756. 1 Gale, and see *Doe d. Johnson v. Baytup*, 1 Har. & W. 270.

sheriff do not furnish his notes of the trial in proper time, the court will allow further time for making the motion for a new trial^a. And if they are withheld after the court has required their production, he may be compelled to pay the expenses caused to the parties by their non-production^b; but he is not answerable for his agent's conduct in withholding them, unless it be shewn that the latter acted under his direction.

If the proceedings are not stayed by the certificate of the sheriff or judge before whom the trial is had, or by a judge's order for staying judgment or execution, the plaintiff, we have seen^c, may forthwith tax his costs, sign judgment, and issue execution. And where, upon a trial under the act, the plaintiff having obtained a verdict, got his costs taxed, and signed judgment on the same day, the court held that the judgment was regular^d. A sheriff, or judge of an inferior court, to whom a cause is sent by writ of trial, has no power of certifying, to deprive the plaintiff of costs, pursuant to the 43 Eliz. c. 6. § 2^e: and a debt reduced below 40*s.* by a set-off, on a trial before the under-sheriff, is not within the jurisdiction of the court of requests' acts^f. But where the plaintiff did not recover 5*l.* in a case within the provisions of the *London* court of conscience act, (39 & 40 Geo. III. c. civ. § 12.) he was not entitled to costs^g. And a defendant, by consenting to a cause being tried before the sheriff, under the writ of trial act, knowing at the time that he was liable to be sued for the debt in a local court only, does not thereby waive his right to claim costs from the plaintiff, upon his recovering less than 5*l.*^h.

Taxing costs, and signing judgment.

Decisions as to costs, on 43 Eliz. c. 6. and court of requests' acts.

^a *Thomas v. Edwards*, 2 Dowl. Rep. 664. 4 Tyr. Rep. 835. 1 Crompt. M. & R. 382. S. C. Anon. 1 Har. & W. 146. *Morris v. Handey*, *id.* (a.)

^b *Metcalf v. Parry*, 3 Dowl. Rep. 93. 9 Leg. Obs. 220. S. C.; and see *Same v. Same*, 2 Dowl. Rep. 589. 9 Leg. Obs. 61. S. C.

^c *Ante*, 470.

^d *Nicholls v. Chambers*, 2 Dowl. Rep. 693. 1 Crompt. & M. 385. 4 Tyr. Rep. 836. S. C.

^e *Wardroper v. Richardson*, 1 Ad. & E. 75. 3 Nev. & M. 839. S. C.; and see *Grant v. Ramsey*, 11 Leg. Obs. 307. *Claridge v. Smith*, 4 Dowl. Rep. 583. 1 Har. & W. 667. S. C.

^f *Jenkinson v. Morton*, (or *Norton*), 1 Meeson & W. 300. 1 Tyr. & G. 676.

5 Dowl. Rep. 74. 12 Leg. Obs. 115, 16. S. C.; and see *Bailey v. Chitty*, 2 Meeson & W. 28. 5 Dowl. Rep. 307. 13 Leg. Obs. 110, 11. S. C.

^g *Kidd v. Mason*, 3 Dowl. Rep. 85. *Same v. Same*, *id.* 96. 9 Leg. Obs. 235. S. C. *Bond v. Bailey*, 3 Dowl. Rep. 808. 1 Gale, 162. 2 Crompt. M. & R. 246. 10 Leg. Obs. 331, 2. S. C.; and see *Godson v. Lloyd*, 4 Dowl. Rep. 157. 1 Gale, 244. 10 Leg. Obs. 462. S. C. *Croad v. Harris*, 4 Dowl. Rep. 616. 1 Har. & W. 657. 11 Leg. Obs. 436. S. C. *Bernard v. Turner*, 1 Meeson & W. 580. *Turner v. Barnard*, 5 Dowl. Rep. 170. 12 Leg. Obs. 246, 7. S. C.; but see stat. 5 & 6 W. IV. c. xciv.

^h *Shaw v. Oates*, 4 Dowl. Rep. 720; and see *Post*, Chap. XL.

Provisions of
stat. 1 W. IV.
c. 7. extended
to judgments
and executions
upon writs of
trial.

Motion in ar-
rest of judg-
ment.

Entry of judg-
ment.

There is a *proviso* in the law amendment act^a, that "all and every
" the provisions contained in the statute made and passed in the first
" year of the reign of his present majesty, intituled, 'An act for the
" more speedy judgment and execution, in actions brought in his
" majesty's courts of law at *Westminster*, and in the court of Common
" Pleas of the county palatine of *Lancaster*, and for amending the law
" as to judgment on a *cognovit actionem*, in cases of bankruptcy^b,
" shall, so far as the same are applicable thereto, be extended and ap-
" plied to judgments and executions upon writs for the trials of issues,
" in like manner as if the same were expressly re-enacted therein."

And upon this *proviso*, the court will, in the next term, entertain a
motion to vacate and arrest a judgment signed in vacation^c.

In entering judgment on the roll, after trial before the sheriff,
&c. the issue is first copied; after which the entry proceeds with the
sheriff's return to the writ of trial, (*copying it*), and concludes with
the judgment of the court, whether it be for the plaintiff on a verdict,
or for the defendant on a verdict or nonsuit. The form of a judg-
ment for the plaintiff, is given in the schedule annexed to the statu-
tory rules of pleading^d; and may be easily applied to other cases.

^a 3 & 4 W. IV. c. 42. § 19.

^d R. Pl. H. 4 W. IV. Sched. No. 8.

^b Stat. 1 W. IV. c. 7. *Ante*, 294, 5.

Append. Post, § 8; and see Append. to

^c *Pyke v. Glendinning*, 2 Dowl. Rep. Tidd Prac. 9 Ed. 310, 11, 12.

611. *per Patterson, J.*

CHAP. XXXIV.

Of the RECORD of NISI PRIUS, JURY PROCESS, SPECIAL JURIES, and VIEWS.

THE record of *nisi prius* contains an entry of the declaration and pleadings, and the issue or issues joined thereon, with the award of the *venire facias*, as in the issue made up and delivered to the defendant's attorney, or his agent; and is in the nature of a commission to the judges at *nisi prius*, for the trial of the cause. It formerly began with the *placita*, or style of the court, of the term issue was joined; and, in the King's Bench, after the award of the *venire facias*, there was always a second *placita*, of the term in or after which the cause was tried^a: But in the Common Pleas, there was no second *placita*, where the parties went to trial the same term issue was joined, unless on the death or change of a chief justice^b. And now, by the form given in the schedule annexed to the late statutory rules of pleading^c, the *placita* are directed to be omitted; and after copying the issue or issues intended to be tried, to the end of the award of the *venire facias*, the record concludes with an entry called the *jurata*, (which, by another statutory rule^d, is directed to be still retained,) stating that on the *teste* of the *distringas* or *habeas corpora*, the jury between the parties is respited until the return day thereof, unless the chief justice, or judges of assize, shall first come on the first day of sittings, or commission day of assizes, according to the form of the statute, &c. for default of the jurors, because none of them did appear: and the sheriff is required to have the bodies of the said jurors accordingly.

Record of *nisi prius*, and its contents.

Placita, in K.B.

In C. P.

Abolished.

Jurata.

^a Append. to Tidd *Prac.* 9 Ed. Chap. XXXIV. § 1.

^b Gilb. C. P. 80, 81. 1 *Crompt.* 3 Ed. 229. 2 *Wms. Saund.* 5 Ed. 253. (8.); and see Tidd *Prac.* 9 Ed. 775.

^c R. Pl. H. 4 W. IV. Sched. No. 2. 5 *Barn. & Ad. Append.* xi. 10 *Bing.* 473. 2 *Crompt. & M.* 26. *Append. post.* §

9. And as to the record of *nisi prius* and its contents, and by whom made up, &c., previously to the above rules, see Tidd *Prac.* 9 Ed. 775, 6, 7. *Append. thereto*, Chap. XXXIV. § 1, 2.

^d R. Pl. Gen. H. 4 W. IV. reg. 2. 5 *Barn. & Ad. Append.* ii. 10 *Bing.* 464. 2 *Crompt. & M.* 11.

After judgment
of *respondeat
ouster*.

Formerly, if there had been a plea in abatement, upon which a *respondeat ouster* was awarded, and afterwards the defendant had pleaded in chief, it was necessary to enter the plea in abatement and judgment of *respondeat ouster*, in making up the issue, as well as the plea in chief^a: And where they were entered in the plea roll, but omitted in the record of *nisi prius*, the court on that ground arrested the judgment; the record of *nisi prius* not appearing to be in the same cause^b. Afterwards, a rule was made in the King's Bench, that for the future, a copy of the plea in chief only should be entered and paid for^c: and agreeably thereto, where the plea in abatement, and judgment of *respondeat ouster*, were omitted in the plea roll, the court held the omission to be immaterial; particularly as the defendant had accepted and paid for the issue^d. And now, since the late statutory rule of H. 4 W. IV. reg. 15.^e, it is not necessary to enter upon the *nisi prius* record, a plea in abatement, and judgment of *respondeat ouster* thereupon^f. By the practice of the courts of King's Bench and Exchequer, a plaintiff has not a right to enter and pass his record, immediately after issue joined and notice of trial given, so as to make the defendant pay the costs of it; but it is in the discretion of the master to allow such costs or not, as he thinks fit^g. In causes which stand over from one sitting or assizes to another, the record should be regularly resealed, previously to the sittings or assizes to which they stand over; or in default thereof, the causes cannot be tried^h.

Costs of passing record.

Resealing record.

Teste and return
of *venire facias*,
&c.

The writ of *venire facias juratores*, being the first process for convening a jury, was formerly *tested* on the first day of the term, in or after which the cause was to be tried; and was made returnable on some day before the trial, being a *general* return day or day *certain*, according to the previous proceedings: If in a country cause, the *venire* by *original* was made returnable on the last general return day,

^a Anonymous, 7 Mod. 51. Anon. 1 Salk. 5.

^b Doberteen v. Chancellor, 1 Ld. Raym. 329. Carth. 447. 5 Mod. 399. 12 Mod. 189. S. C.

^c Anonymous, 7 Mod. 51. Anon. 1 Salk. 5.

^d Comb v. Pitt, 3 Bur. 1682; and see Tidd Prac. 9 Ed. 721.

^e Ante, 446.

^f Pepper v. Whalley, 4 Ad. & E. 90. 5

Nev. & M. 437. 1 Har. & W. 480. S. C.

^g M'Kune (or Keen) v. Smith, 2 Meeson & W. 85. 5 Dowl. Rep. 286. S. C.

^h R. E. 33 Geo. III. R. M. 6 Geo. IV. K. B. Crowder v. Rooke, 2 Wils. 144. C. P.; and see Chandler v. Beswold, 5 Dowl. Rep. 311. Tidd Prac. 9 Ed. 776.

or, if by *bill*, on the last day of the term before the assizes ; and the *distringas*, or *habeas corpora*, was tested on the *quarto die post* of the return by *original*, or by *bill* on the return of the *venire* ; and made returnable on the first general return day or day certain in term time, after the trial^a. But, by the statute 3 & 4 W. IV. c. 67.^b, reciting that by the existing law, and the practice of the courts of common law at *Westminster*, actions may be brought, and issues proceed to trial and final judgment in *vacation*, notwithstanding the cause of action may have arisen subsequent to the then preceding term, and jury process was by law tested in *term* time only ; it was enacted, that “ from and after the passing of that act, the writ of *venire facias juratores* may be tested on the day on which the same shall be issued, “ and be made returnable forthwith ; and that the writ of *distringas juratores*, or *habeas corpora juratorum*, may be tested in *term* or *vacation*, on a day subsequent to the *teste* of the writ of *venire facias juratores* : Provided always, that when any trial is to be had at *bar*, “ the writ of *venire facias juratores* shall be made returnable as heretofore.”

In the Common Pleas at *Lancaster*, by a late act for improving the practice and proceedings in that court^c, “ every writ of *venire facias juratores*, issued out of the same court, shall bear date on the day next “ preceding the first commission day of each assizes, unless such “ commission day shall be on a *Monday*, and then on the *Saturday* preceding ; and every writ of *habeas corpora juratorum* shall bear date “ on the day of the return of the *venire facias juratores*.”

In C. P. at Lancaster.

By the statutes 3 Geo. II. c. 25. § 8. and 6 Geo. IV. c. 50. § 15. a panel is required to be annexed to the writ of *habeas corpora* or *distringas*, containing the names of the jurors, with their places of abode and additions ; upon which statutes it has been holden, that the want of a panel to a writ of *distringas juratores*, is error ; and the defect is not cured by the statutes of jeofails^d. But where one panel only is annexed to the writs of *venire facias* and *distringas juratores*, it is no ground of error^e.

Want of panel to writ of *distringas*, &c.

^a Tidd *Prac.* 9 Ed. 781. And as to jury process in general, see *id.* 777 ; the qualification, disqualification, and exemption of jurors, *id.* 782 ; the mode of returning common juries, *id.* 785 ; and of striking special juries, *id.* 787.

^b § 2.

^c 4 & 5 W. IV. c. 62. § 33.

^d *Rogers v. Smith*, 3 Nev. & M. 760. 1 Ad. & E. 772. S. C.

^e *Green (or Archbold) v. Smith*, 5 Dowl. Rep. 174. 1 Meeson & W. 740. 12 Leg. Obs. 196. S. C.

Discharging
rule for special
jury, in K. B.

In C. P.

Special jury,
when allowed or
not, in C. P.

Costs of special
jury.

By stat. 6 Geo.
IV. c. 50.

In the King's Bench, when a rule for a special jury has been obtained for the mere purpose of delay ^a, it is usual to move the court, on an *affidavit* of the circumstances, for a rule to shew cause, why the rule for a special jury should not be discharged; which the court will make absolute, on an *affidavit* of service, unless good cause be shewn to the contrary ^b. In the Common Pleas, it was not formerly usual, as in the King's Bench, to move the court for a rule to shew cause why the rule for a special jury should not be discharged: But if delay were suggested as the motive for the application, and not satisfactorily denied, the practice seems to have been for the court to direct the cause to be tried by a special jury, within the term ^c, unless such terms were offered as would obviate the objection ^d; and giving judgment of the term was not in all cases satisfactory. In that court, the defendant was allowed to have a special jury upon certain terms favourable to the plaintiff, after the cause had stood for trial by a common jury during a whole sittings, and had been twice postponed at the instance of the defendant ^e. And the court refused to discharge the rule for a special jury, on the ground that the defendant had obtained it in *January* 1831, and up to the *Michaelmas* term following had omitted to strike the jury, although the cause stood for trial in *July* ^f. But the court discharged a rule for a special jury, where it had not been duly acted on, and appeared to have been obtained for the purpose of delay ^g.

It was formerly holden, that the fees for *striking* a special jury, should be paid by the party applying for it; but that the other expenses of the trial should abide the event of the suit ^h: But, by the statute 6 Geo. IV. c. 50. ⁱ "the person or party who shall apply for "a special jury, shall pay the fees for *striking* such jury, and all the "expenses occasioned by the trial of the cause by the same; and "shall not have any further or other allowance for the same, upon "taxation of costs, than such person or party would be entitled unto, "in case the cause had been tried by a common jury; unless the

^a *Maltby v. Moses*, 1 Chit. R. 489, 90. 795.

^b *Tidd Prac.* 9 Ed. 794, 5.

^c *Bloxam v. Brown*, 4 Taunt. 470.

Briggs v. Dixon, 4 Moore, 414. *Tripp v. Patmore*, *id.* 470.

^d *Briggs v. Dixon*, 4 Moore, 414.

^e *Thorne v. Marquess of Londonderry*, 8 Bing. 26. 1 Moore & S. 62. S. C.

^f *Andrews v. Thornton*, (or *Thomson*),

8 Bing. 64. 1 Moore & S. 39. 3 Leg. Obs. 149, 50. S. C.; and see *Tidd Prac.* 9 Ed.

^g *Stanbury v. Gillett*, 9 Bing. 319. 2 Moore & S. 397. S. C.

^h *Say. Costs*, 181. *Hamelton v. Style*, and *Wilks v. Eames*, 2 Str. 1080. *Eyles v. Smart*, Cas. Pr. C. P. 138. *Barnes*, 128. S. C.; and see *Tidd Prac.* 9 Ed. 792.

ⁱ § 34.; and see stat. 24 Geo. II. c. 18. § 1.

"judge, before whom the cause is tried, shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." This provision, however, did not apply to cases in which the plaintiff had been *nonsuited*^a: and it being deemed expedient that the judge should have such power of certifying, as well when a plaintiff is *nonsuited*, as when he has a *verdict* against him, it was enacted by the law amendment act^b, that "the said provision of the statute 6 Geo. IV. c. 50, "and every thing therein contained, shall apply to cases in which the plaintiff shall be *nonsuited*, as well as to cases in which a *verdict* shall pass against him."

By law amendment act.

In actions of *waste*, and trespass *quare clausum fregit*, the necessity for a *view* in general appears on the face of the pleadings; and in other cases, the motion for it had become a motion of course in the King's Bench, requiring only counsel's signature; upon which a rule of court was drawn up in term time, or a judge's order in vacation. In the Common Pleas, it was said, that a rule for a view was never granted, without an *affidavit*, in any case, except in an action of *waste*^c; and therefore, in other cases, an application must have been made for the rule, to the court in term time, or to a judge in vacation, on an *affidavit* of the circumstances^d. But, by a general rule of all the courts^e, "the rule for a view may in all cases be drawn up by the officer of the court, on the application of the party, without *affidavit*, or motion for that purpose." The costs of a view are not allowed in the Common Pleas, unless the writ of *habeas corpora juratorum* contain the name of a shewer appointed by the defendant, as well as by the plaintiff^f.

Rule for view, how obtained.

Costs of view.

^a Wood v. Grimwood, 10 Barn. & C. 689. 699. 5 Man. & R. 622. S. C.

^b 3 & 4 W. IV. c. 42. § 35.

^c Anon. Barnes, 467.; and see Redfern v. Smith, 9 Moore, 497. 2 Bing. 262. S. C.

^d Tidd Prac. 9 Ed. 485. 797.

^e R. H. 2 W. IV. reg. L. § 63. 3 Barn. & Ad. 382. 8 Bing. 297. 2 Crompt. & J. 185. *Anie*, 239.

^f Taylor v. Thompson, 7 Bing. 408. 5 Moore & P. 255. 1 Dowl. Rep. 218. S. C.; and see Tidd Prac. 9 Ed. 798.

CHAP. XXXV.

Of EVIDENCE, and WITNESSES.

How considered.

Expense of witness, to prove copy of judgment, &c.

Handwriting to, or execution of written instrument.

IN the present Chapter it is proposed to consider, 1st, the recent regulations, as to the admission of written or printed documents, &c.; 2dly, the admissibility of interested witnesses; and 3dly, the examination of witnesses on interrogatories, &c. It was formerly necessary that the copy of a judgment, writ, or other *public* document, if not admitted by the adverse party, should be proved at the trial by the person making such copy; and the handwriting to or execution of any written instrument stated upon the pleadings, must also have been proved, if not admitted, by the attesting witness, or other person acquainted with such handwriting, or execution^a: But this practice being attended with great and unnecessary expense to the parties, it was ordered by a general rule of all the courts^b, that "the expense of a witness, called only to prove the copy of any judgment, writ, or other *public* document, shall not be allowed in costs, unless the party calling him shall, within a reasonable time before the trial, have required the adverse party, by notice in writing^c, and production of such copy, to admit such copy; and unless such adverse party shall have refused or neglected to make such admission." And by another rule^d it is ordered, that "the expense of a witness, called only to prove the handwriting to, or the execution of, any written instrument stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons^e before a judge, a reasonable time before the trial, such summons stating therein the name, description, and place of abode of the intended witness, have neglected or refused to admit such handwriting, or execution; or unless the judge, upon attendance

^a Tidd *Prac.* 9 Ed. 948.

^b R. H. 2 W. IV. reg. VI. 3 Barn. & Ad. 392. 8 Bing. 307. 2 Crompt. & J. 201.

^c Append. to Tidd *Sup.* 1832, p. 115.

^d R. H. 2 W. IV. reg. VII. 3 Barn. & Ad. 392. 8 Bing. 307. 2 Crompt. & J. 201.

^e Append. to Tidd *Sup.* 1832, p. 115.

before him, shall indorse upon such summons, that he does not think it reasonable to require such admission."

By the law amendment act^a, reciting that it is expedient to lessen the expense of the proof of written or printed documents, or copies thereof, on the trial of causes; it is enacted, that "it shall "and may be lawful for the judges of the superior courts of common "law at *Westminster*, or any *eight* or more of them, of whom the "chief of each of the said courts shall be *three*, at any time within "five years after that act shall take effect, to make regulations, by "general rules or orders, from time to time, in term or in vacation, "touching the voluntary admission, upon an application for that purpose, at a reasonable time before the trial, of one party to the "other, of all such written or printed documents, or copies of "documents, as are intended to be offered in evidence on the said "trial, by the party requiring such admission, and touching the "inspection thereof before such admission is made, and touching the "costs which may be incurred by the proof of such documents "or copies on the trial of the cause, in case of the omitting to apply "for such admission, or the not producing of such document or "copies, for the purpose of obtaining admission thereof, or of the "refusal to make such admission, as the case may be, and as to the "said judges shall seem meet; and all such rules and orders shall be "binding and obligatory in all courts of common law, and of the "like force, as if the provisions therein contained had been expressly "enacted by parliament." And there is a similar clause in the late act, for improving the practice and proceedings in the court of Common Pleas of the county palatine of *Lancaster*^b.

In pursuance of the law amendment act, a rule of court was made by all the judges^c, by which it is ordered, that "either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form thereto annexed, marked (A.)^d or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within *forty-eight* hours, to make the admission specified, the party requiring such admission may call on the party required, by *summons* to shew cause

Power of judges to make regulations, as to the admission of written or printed documents, &c.

Rule made in pursuance thereof.

Notice of intention to adduce in evidence, written or printed documents.

Summons and order, in case of refusal to admit them.

^a 3 & 4 W. IV. c. 42. § 15; and see 2 Rep. C. L. Com. 17. 67. And as to written evidence, of a public or private nature, see *Tidd Prac.* 9 Ed. 800, &c. and the several cases and authorities there referred to.

^b Stat. 4 & 5 W. IV. c. 62. § 17.

^c R. Pr. H. 4 W. IV. reg. 20. 5 Barn. & Ad. Append. xvii. 10 Bing. 456. 2 Crompt. & M. 6, 7.

^d Append. Post, § 10.

before a judge, why he should not consent to such admission, or in case of refusal, be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial, to the satisfaction of the judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause: Provided, that if the judge shall think the application unreasonable, he shall indorse the summons accordingly: Provided also, that the judge may give such time for inquiry, or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit: and that if the party required shall consent to the admission, the judge shall order the same to be made."

Time for inquiry and inspection.

Judge's order on consent.

Costs of proving written or printed documents not to be allowed, to party who has not given such notice.

Costs of application, &c.

Decisions on the above rule.

And it is thereby further ordered, that "no costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons, that he does not think it reasonable to require it: and that a judge may make such order as he may think fit, respecting the costs of the application, and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause."

On this rule, the plaintiff paying the defendant the expenses of examining a judgment and other documents abroad, an order was made for the defendant to pay the expense of proving them at the trial, (such proof being satisfactory to the judge, and so certified by him,) whatever might be the result of the cause, if after such examination the defendant did not admit them^a. And if, on a summons to admit the handwriting of the defendant, his attorney refuse to admit it, and the usual order be made, the judge at the trial will certify for the costs of a witness who is called to prove the handwriting, if such witness, on his examination in chief, depose to no other fact^b. The court however has not jurisdiction under the above rule, to order the

^a *Smith v. Bird*, 3 Dowl. Rep. 641. 1 Hodges, 96. S. C. And as to what shall be deemed a reasonable notice, to allow copies to be given in evidence, see *Tynn (or Tinn) v. Billingsley*, 3 Dowl. Rep.

810. 2 Crompt. M. & R. 253. 5 Tyr. Rep. 788. 10 Leg. Obs. 397, 8. S. C.

^b *Stracey v. Blake*, 7 Car. & P. 404. *per* *Ld. Abinger*, Ch. B.; and see *Same v. Same*, 1 Tyr. & G. 528.

admission of documents; but if a judge at chambers desire parties coming before him to go before the court, they will be heard, though the court will pronounce no judgment, leaving that to be done by the judge at chambers ^a.

It is a general rule, that the witnesses should be such as are not interested in the event of the suit ^b: but in order to render the rejection of witnesses, on the ground of interest, less frequent, it is enacted by the statute 3 & 4 W. IV. c. 42 ^c, that "if any witness shall be objected to as incompetent, on the ground that the verdict or judgment, in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him." On this statute, where the defendant proved, in support of a plea of payment, the payment of a certain sum to *H.* the plaintiff's attorney, on the plaintiff's account, in answer to which the plaintiff tendered *H.* as a witness to prove that the defendant afterwards called upon him, and got the money back again, but his evidence was rejected on the ground of his being interested, and the defendant obtained a verdict, the court held that the witness was competent, and that the evidence ought to have been received ^d. And if a right of way be pleaded for the inhabitant householders of *M.* to fetch water, an inhabitant householder of *M.* may be examined as a witness, in support of this plea ^e. This statute, however, does not make the drawer of an accommodation bill a competent witness for the defendant, in an action by the indorsee against the acceptor ^f. So, in an action against a carrier, for negligence in carrying a parcel, the carrier's ser-

Witnesses interested solely on account of verdict admissible, by stat. 3 & 4 W. IV. c. 42.

Decisions thereon.

^a *Stracey v. Blake*, 7 Car. & P. 404. *per* Ld. Abinger, Ch. B.; and see *Same v. Same*, 1 Tyr. & G. 528.

^b *Tidd Prac.* 9 Ed. 799.

^c § 26. And as to the incompetency of witnesses, on the ground of their being interested in the event of the suit, see the cases of *Rex v. Bray*, Car. temp. Hardw. 358. *Abraham v. Bunn*, 4 Bur. 2251. *Bent v. Baker*, 3 Durnf. & E. 27. *Smith v. Prager*, 7 Durnf. & E. 60. *Doddington*

v. Hudson, 1 Bing. 257. and *Radburn v. Morris*, 4 Bing. 649.

^d *Bowers v. Evans*, 1 Meeson & W. 214.

^e *Knight v. Woore*, 7 Car. & P. 258. *per Williams, J.*

^f *Burgess v. Cuttill (or Cuthill)*, 6 Car. & P. 282. 1 Moody & R. 315. S. C. *per* Ld. Lyndhurst, Ch. B.; and see *Bias v. Mountain, id.* 302. *per Alderson, J.*

vant is not made a competent witness for the defendant^a. So, in an action for damage done to the plaintiff's horse and cart, by the negligent driving of the defendant's servant, the plaintiff's servant, who was driving his cart at the time of the accident, is not a competent witness for the plaintiff, without a release; and the statute has made no alteration in the law on this point^b. In these cases therefore, the witness cannot be examined, without a release. And a release by an individual corporator to the corporation, of all his interest in the subject matter of the action, will not render him an admissible witness, in an action of *trespass* for an injury done to the corporation land^c.

Name of witness
to be indorsed
on record.

By the same statute^d, "the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be inadmissible in evidence for or against him, shall, at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party; and shall be afterwards entered on the record of the judgment: and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

Witnesses could
not formerly
have been ex-
amined on inter-
rogatories, &c.
without consent
of parties.

Before the statute 1 W. IV. c. 22. great difficulties were often experienced, from the impossibility of obtaining the personal attendance of witnesses at the trial. Sometimes it was found that they were unable to attend, by reason of absence in foreign countries; sometimes, by reason of dangerous illness, or permanent infirmity. To prevent a failure of justice from any of these circumstances, the courts of law frequently availed themselves of the opportunity which an application for some indulgence afforded, to obtain, as a condition, the consent of a party to an examination of such witnesses, previously to the trial, upon *interrogatories*, before an officer of the court, or before commissioners; and the courts, in proper cases, would restrain a plaintiff from proceeding to trial, until he consented to a *commission* for examining material witnesses residing abroad: But when the courts of law had not the opportunity of compelling the consent of par-

^a *Harrington v. Caswell*, 6 Car. & P. 352.

^b *Harding v. Cobley*, 6 Car. & P. 661. *per* Ld. Denman, Ch. J.; and see *Biss v. Mountain*, 1 Moody & R. 302; but see *Fancourt v. Bull*, 1 Hodges, 98. 1 Bing.

N. R. 681. 1 Scott, 645. S. C.

^c *Bailiffs and Assistants of Godmanchester v. Phillips*, 1 Har. & W. 686. 6 Nev. & M. 211. S. C.

^d Stat. 3 & 4 W. IV. c. 42. § 27.

ties by such indirect means, recourse must have been had to a court of equity, where a new suit must have been instituted for the purpose, as auxiliary to the suit at law ^a.

These inconveniences were in part remedied by the statute 13 Geo. III. c. 63. ^b; which enacted, that "when and as often as the *East India* company, or any person or persons, should commence or prosecute any action or suit, in law or equity, for which cause had arisen in *India*, against any other person or persons, in any of his Majesty's courts at *Westminster*, it should and might be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission, as therein mentioned, for the examination of witnesses; and such examination being duly returned, should be allowed and read, and should be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action." ^c

Upon this statute, writs were granted in several cases, by the court of King's Bench ^d; and, in one of them ^e, the motion being made on the last day of term, the court awarded such writ, even before issue joined. And the court of Common Pleas granted a *mandamus* to a court in *India*, to examine witnesses on behalf of the defendant in a civil action ^f. Where a defendant, at his own expense, had obtained a writ of *mandamus*, under the above statute, for examining witnesses in *India*, and depositions were returned, and filed at the secondaries office of the Common Pleas, the court held that the plaintiff was entitled to copies of them, on payment of the charges for making such copies, although he had not attended in court in *India*, either by

Writ, in nature of *mandamus*, or commission, to examine witnesses in *India*, by stat. 13 Geo. III. c. 63. § 44.

Writs granted upon this statute, and decisions thereon.

^a 2 Rep. C. L. Com. 23, 4. 73, &c.

^b § 44.

^c For the form of a rule for the examination of witnesses in *India*, on this statute, before 1 W. IV. c. 22, see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 26; for the affidavit in support thereof, *id.* § 25; and for the *mandamus* thereon, *id.* § 27: and see the statutes 24 Geo. III. c. 25, for establishing a court of judicature, for the more speedy and effectual trial of persons accused of offences committed in the *East Indies*, § 78. 81. and 42 Geo. III. c. 85. by which offences committed by persons employed in any public service abroad, may be prosecuted in the court of King's Bench in *England*, § 1; and that

court is authorized, on motion, to award a writ of *mandamus* to any court of judicature, or the governor, &c. of the country where the offence was committed, to obtain proof of the matters charged, § 2; and may order an examination on interrogatories *de bene esse*, where *vivâ voce* evidence cannot conveniently be had, § 3; and see *Rex v. Jones*, 8 East, 31.

^d *Mullick v. Lushington*, M. 26 Geo. III. *East India Company v. Ld. Malden*, E. 32 Geo. III. *Taylor v. East India Company*, M. 33 Geo. III. K. B.

^e *Spalding v. Mure*, T. 35 Geo. III. K. B.

^f *Grillard v. Hogue*, 1 Brod. & B. 519. 4 Moore, 313. S. C.

his agent or counsel^a. And where a *mandamus* was granted for the defendant to examine witnesses in *India*, the plaintiff, having obtained a verdict, was holden to be entitled to his costs of cross examining such witnesses^b. But where the plaintiff had applied for and obtained such writ, which was returned, with the depositions, to this country, but the defendants did not join in the application for the writ, nor examine or cross examine witnesses under it, and the plaintiffs obtained a verdict, the court held that they were not entitled to the costs attending the writ, or of the office copies of the depositions^c. The court of Exchequer has the same power as the courts of King's Bench and Common Pleas, since the 13 Geo. III. c. 63. § 44. to issue a *mandamus* or commission, for the examination of witnesses abroad^d.

Powers and provisions of the above statute extended by 1 W. IV. c. 22. to the colonies, &c. and to all actions in the courts at Westminster.

The powers and provisions of the above statute, which confined the power of the courts in granting writs of *mandamus* for the examination of witnesses in *India*, to causes of action arising in that country, were extended by the statute 1 W. IV. c. 22^e; by which it is enacted, "that all and every the powers, authorities, provisions, and matters, contained in the therein recited act^f, relating to the examination of witnesses in *India*, shall be, and the same are thereby extended to all colonies, islands, plantations, and places, under the dominion of his majesty, in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice, in the matter wherein such writ shall be applied for." On this statute the court has power to issue a *mandamus*, to examine a witness in *India*, where-soever the cause of action may have arisen^g.

Judges, to whom writ or commission is directed, empowered to

And it is thereby further enacted, that "when any writ or commission shall issue, under the authority of the said recited act, or of the power thereinbefore given by that act, the judge or judges to whom

^a Davidson v. Nicol, 5 Moore & P. 185. 1 Dowl. Rep. 220. Davis v. Nicholson, 7 Bing. 358. S. C.

^b Whytt v. Macintosh, 2 Man. & R. 183. 8 Barn. & C. 317. S. C.

^c Fairlie v. Parker, 1 Moore & P. 488.

^d Savage v. Binny, 2 Dowl. Rep. 643. per Parke, B.

^e § 1.

^f Stat. 13 Geo. III. c. 63.

^g Bain v. De Vettry, 1 Gale, 52. 3 Dowl. Rep. 516. 10 Leg. Obs. 46. S. C.

"the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the court whereof they are judges does or may possess for that purpose, in suits or causes depending in such court." ^a And "that the costs of every writ or commission to be issued under the authority of the said recited act, or of the power thereinbefore given by that act, in any action at law depending in either of the said courts at *Westminster*, and of the proceedings thereon, shall be in the discretion of the court issuing the same." ^b

enforce the attendance and examination of witnesses.

Costs of writ or commission, and proceedings thereon, to be in discretion of the court.

The application for a writ of *mandamus* may be made by either party; and must be to the court in which the action is pending, supported by an *affidavit* of the facts, shewing the necessity for issuing such writ: The rule, if granted, is in the first instance only a rule *nisi* ^c, which must be served on the opposite party, and if no sufficient cause be shewn, it will be made absolute of course ^d; and should be drawn up with the clerk of the rules in the King's Bench and Exchequer, and with the secondaries in the Common Pleas. The writ of *mandamus* is made out by the attorney; and, after being signed and sealed, should be forwarded to an agent, to be delivered to the judge or judges of the court to whom it is directed, with proper instructions for the examination of the witnesses ^e.

Application for *mandamus*, and proceedings thereon.

The practice of examining witnesses on interrogatories, in other cases, is regulated by the statute 1 W. IV. c. 22. ^f; by which it is enacted, that "it shall be lawful to and for each of the courts at *Westminster*, and also the court of Common Pleas of the county palatine of *Lancaster*, and the court of pleas of the county palatine of *Durham*, and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon *interrogatories* or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending; or to order a *commission* to issue, for the examination of witnesses on oath, at any place or places out of such jurisdiction, by *interrogatories* or otherwise; and by the same, or any subsequent

Courts at *Westminster*, *Lancaster*, and *Durham*, may order the examination of witnesses within their jurisdiction, by an officer of the court, &c.; or may order a commission for that purpose, out of their jurisdiction.

^a Stat. 1 W. IV. c. 22. § 2.

^b *Id.* § 3.

^c Doe d. Grimes (or Winter) v. Pattison, 3 Dowl. Rep. 35. 9 Leg. Obs. 108. S. C. per *Littledale*, J.

^d For the form of a rule for a *mandamus*, on stat. 1 W. IV. c. 22. founded on

a judge's order to examine witnesses in *New South Wales*, see Append. to Tidd Sup. 1833, p. 313; and for a *mandamus* to examine witnesses in *India*, or the colonies, &c. see *id.* 313, 14.

^e Chapm. Prac. K. B. 2 Ed. 235.

^f § 4, &c.

"order or orders, to give all such directions, touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just." This clause of the statute, it will be seen, extends to the courts of the counties palatine of Lancaster and Durham: but there is a *proviso* therein^a, that "no order shall be made, in pursuance of that act, by a single judge of the court of pleas of the county palatine of Durham, who shall not also be a judge of one of the said courts at Westminster."

Proviso as to judges of Durham.

Proceedings under the above act.

Under the above act, a rule of court^b, or order of a judge^c, may be obtained, on a proper *affidavit*^d, for the examination of witnesses on oath, upon *interrogatories*^e, or *voir dire*^f, within the jurisdiction of the court where the action is depending; or for a *commission*^g to issue, for their examination on oath, at any place or places out of such jurisdiction, by *interrogatories* or otherwise. And a witness may be ordered to be examined upon interrogatories, on the trial of an issue directed by the court of Chancery^h. If the witness be in Scotland, he must be examined on a *commission*, and not under a *mandamus*ⁱ. And the court granted a commission, for the examination of a witness residing in Dublin, in an action for criminal conversation with the plaintiff's wife^k. In order to obtain a rule or order for the examination of witnesses within the jurisdiction of the court, the name of the person before whom the examination is to take place must be mentioned^l. And where it was suggested, that the plaintiff had deferred his application for the examination of witnesses about to sail for India, until the last moment, in order to elude a cross examination, the examination was ordered to be taken provisionally; the plaintiffs satisfying the

Rule or order for examining witnesses, within the jurisdiction of the court, how, and in what cases obtained.

^a § 11.

^b For the form of a rule of court for the examination of witnesses on interrogatories, in K. B. before stat. 1 W. IV. c. 22, see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 12.; and see *id.* § 13. *Pirie v. Iron*, 1 Moore & S. 223. 8 Bing. 143. 1 Dowl. Rep. 252. S. C.

^c Append. to Tidd *Sup.* 1833. p. 315. And for a judge's order to examine witnesses on interrogatories in vacation, before stat. 1 W. IV. c. 22, see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 14.

^d Append. to Tidd *Sup.* 1833, p. 315. and see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 11.

^e Append. to Tidd *Prac.* 9 Ed. Chap.

XXXV. §. 21, 2.

^f Append. to Tidd *Sup.* 1833, p. 316.

^g *Id.* 319, 20; and see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 15 to 20.

^h *Bourdieu (or Bordeaux) v. Rowe*, 1 Hodges, 93. 1 Scott, 608. 1 Bing. N. R. 721. S. C.

ⁱ *Wainwright v. Bland*, 1 Gale, 103. 3 Dowl. Rep. 653. 10 Leg. Obs. 78. S. C.

^k *Norton v. Lamb*, 5 Dowl. Rep. 181. *Norton v. Ld. Melbourne*, 3 Bing. N. R. 67. 3 Scott, 398. S. C.

^l *Doe d. Thorn v. Phillips*, 1 Dowl. Rep. 56. 2 Leg. Obs. 76. S. C. *per Tounson, J.*

court by *affidavit*, that the application had not been delayed with any sinister intention^a. It has been doubted, whether an advanced state of pregnancy be a cause for the examination of a female witness by the prothonotary, under the above statute^b: If it be, it must be shewn, by *affidavits* of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause^b. But the court permitted the examination of a witness before the prothonotary, under the above statute, on payment of costs, upon the *affidavit* of his medical attendant, who swore that he was in a precarious state, and could not attend at the trial without great danger^c.

"When any rule or order shall be made for the examination of witnesses, within the jurisdiction of the court wherein the action shall be depending, by authority of that act, it shall be lawful for the court, or any judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order; and to direct the attendance of any such person to be at his own place of abode, or elsewhere, if necessary or convenient so to do: And the wilful disobedience of any such rule or order shall be deemed a contempt of court, and proceedings may be thereupon had, by attachment^d, (the judge's order being made a rule of court, before or at the time of the application for an attachment,) if, in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served, together with, or after the service of such rule or order: Provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document, that he would not be compellable to produce at a trial of the cause."^e

Compelling attendance of witnesses, and production of documents.

Disobedience to be deemed a contempt of court.

Conduct money, and payment of expenses of witnesses.

Proviso as to production of documents.

^a *Pirie v. Iron*, 8 Bing. 143. 1 Moore & S. 224. 1 Dowl. Rep. 252. S. C.

2 Dowl. Rep. 730. S. C.

^b *Abraham v. Newton*, (or Norton,) 8 Bing. 274. 1 Moore & S. 384. 1 Dowl. Rep. 266. S. C.

^d For the proceedings against a witness for non-attendance, see *Chapm. Prac.* K. B. 2 Ed. 251.

^e Stat. 1 W. IV. c. 22. § 5.

^c *Pond v. Dimes*, 3 Moore & S. 161.

Prisoner may be removed by *habeas corpus*, for examination.

And it is thereby further enacted, that "it shall be lawful for any sheriff, gaoler, or other officer, having the custody of any prisoner, to take such prisoner for examination, under the authority of that act, by virtue of a writ of *habeas corpus*, to be issued for that purpose; which writ shall and may be issued by any court or judge, under such circumstances, and in such manner, as such court or judge may now by law issue the writ, commonly called a writ of "*habeas corpus ad testificandum*." ^a

Examination on interrogatories.

If the examination is directed to be taken on *interrogatories*, the party prepares his interrogatories ^b, which must be engrossed on parchment, and signed by counsel, and a copy given to the opposite party, in order that he may prepare cross interrogatories, if he think proper. Notice of the time and place of examination of the witness ^c, must also be given to the adverse attorney; and the examination must be on oath, or affirmation of the witness, the oath to be administered by the person taking the examination, or by a judge of the court in which the action is pending ^d.

Vid. voce.

If the examination be ordered to be taken *vid. voce*, an appointment must be obtained from the person directed by the rule or order to take the examination: which appointment must specify the time and place of taking the examination, and a copy of the rule or order, with the appointment, must be served on the opposite party; and the witness will then be examined on oath or affirmation, to be administered by the person appointed by the rule for that purpose, in the presence of all parties, or such of them as think proper to attend ^e.

Commission for examining witnesses abroad, and in what cases granted, &c.

The power of the courts at *Westminster* to grant commissions for the examination of witnesses abroad, on the statute 1 W. IV. c. 22. is not confined to cases where the witnesses reside within the king's dominions ^f; but a commission may issue to examine them, in any place out of the jurisdiction of the courts, on motion in that court in which the action shall be depending ^g. This statute, however, does not seem to apply to indictments ^h: And an application under it,

^a *Id.* § 6. Append. to Tidd *Sup.* 1833, p. 317. and for the *præcipe* for this writ, *id.*; and for the *affidavit* on which it was founded, see Chapm. *Prac.* K. B. 2 Ed. 249.

^b For the form of interrogatories for the plaintiff, see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 21; for defendant, *id.* § 22; and for the proceedings on the rule or order to examine witnesses on interrogatories, before stat. 1 W. IV. c. 22, see

Tidd *Prac.* 9 Ed. 811.

^c Append. to Tidd *Sup.* 1833, p. 316.

^d Chapm. *Prac.* K. B. 2 Ed. 241.

^e *Id.* 241, 2.

^f *Duckett v. Williams*, 1 Crompt. & J. 510. 1 Tyr. Rep. 502. 1 Price, N. R. 40. 1 Dowl. Rep. 291. S. C. *Reynard v. Cope*, 1 Tyr. Rep. 505. (*a.*)

^g *Rex v. Lady Briscoe*, 1 Dowl. Rep. 520. 5 Leg. Obs. 384. S. C. *per Parke, J.*

for the examination of a witness resident out of the jurisdiction of the court, must be made as early as possible after issue joined^a. Where a witness resides abroad, at so great a distance that a commission sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such commission, on the application of the defendant; but it must be made out to the satisfaction of the court, that the evidence of the witness would be admissible, and of service to the defendant when obtained^b. And if it appear to the court, that a *mandamus* or commission to examine witnesses abroad is moved for to delay the plaintiff, they will grant the writ only on bringing the money into court^c. Under this statute, a commission to examine witnesses abroad may be granted, without the usual clause, requiring the commissioners to take an oath as such, if circumstances be shewn which make it appear that the commission will be inoperative, unless that clause be omitted^d. And where an *affidavit* in support of an application for a commission to examine witnesses abroad, stated that the facts alleged in the pleadings took place in the presence of the witnesses, that they were resident abroad, and that their evidence was material and necessary, the court held it to be sufficient; and that the *affidavit* need not state that the evidence was admissible, or that the application was *bond fide*, and not for delay; and also that no *affidavit* of merits was necessary^e: and the court, in granting such an application, will not impose terms upon the party applying^f. But where a rule *nisi* was obtained for a commission to examine witnesses in *Jamaica*, founded upon an *affidavit*, stating that there were several persons residing in that island, but whose names were unknown to the deponent, who were cognizant of the facts on which the issue was joined, the court discharged the rule, on the ground that the *affidavit* must either specify the witnesses by name, or otherwise describe them^g.

In an action on a policy of insurance, a rule having been obtained for a commission to examine witnesses abroad on interrogatories, *three weeks'* time was limited for taking the examinations; which proving insufficient, the time was afterwards enlarged^h. In a subsequent

Time limited for taking examinations, &c.

^a *Brydges v. Fisher*, 4 Moore & S. 458.

^b *Lloyd v. Key*, 3 Dowl. Rep. 253.

^c *Dalton v. Lloyd*, 1 Gale, 102.

^d *Clay v. Stephenson*, 1 Har. & W. 409. 5 Nev. & M. 318. 3 Ad. & E. 807. S. C.

^e *Baddeley v. Gilmore*, 1 Meeson & W.

55. 1 Tyr. & G. 369. 1 Gale, 410. S. C.

^f *Gunter v. Mactear*, (or *M'Kear*), 1

Tyr. & G. 245. 1 Meeson & W. 201. 1

Gale, 440. 4 Dowl. Rep. 722. 12 Leg.

Obs. 218. S. C.

^g *Shovey v. Shebelli*, 1 Tyr. Rep. 505.

(a.)

case, where the defendant had obtained a rule for issuing a commission to take interrogatories in *France*, Lord *Tenterden* said that it would be limiting the commission too much, to make it part of the order, that it should be returned in *three* weeks; and observed, that if it were not returned in proper time, the plaintiff might apply that the cause should proceed ^a: The witnesses intended to be examined in this case, and the time, place, and manner of examining them, were mentioned in the order ^a. A rule of court for the examination of witnesses on interrogatories in a foreign country is not an absolute stay of proceedings, but only a limited one ^b. And, on an application by the defendant for a commission to examine witnesses abroad, the court refused to make it a part of the rule, to call upon the plaintiff to produce a bill of exchange in his possession, at the time of executing the commission ^c. So, the court will not stay the issuing of a commission to examine witnesses abroad, merely on the ground that some costs are due from the plaintiff to the defendant in equity ^d. And the costs of executing a commission in a foreign country are costs in the cause, unless some special ground be laid for ordering otherwise ^e.

By whom made out, and proceedings thereon.

The commission for the examination of witnesses out of the jurisdiction of the court, must be made out by the party obtaining the rule: and the interrogatories being prepared, engrossed on parchment, and signed by counsel, should be annexed to the commission, with the cross interrogatories, if any; after which the same should be forwarded, with full instructions, to an agent, to be delivered to the commissioners, the time and place for examination being appointed, and notices thereof given, as directed by the commission; And the examinations having been taken in pursuance thereof, the commission and interrogatories, with the depositions annexed, are returned to the court in which the action is pending, certified under the seals of the commissioners; and either party will be entitled to a copy thereof ^f.

Examination of witnesses to be

As to the mode of examining witnesses on interrogatories, it is declared by the act ^g to be "lawful for all and every person author-

^a *Reynard v. Cope*, 1 Tyr. Rep. 505.
(a.)

^b *Forbes v. Wells*, 3 Dowl. Rep. 318.
Ward v. Grime, 3 Dowl. Rep. 318. 9
Leg. Obs. 331. *per Patterson*, J.

^c *Cunliffe v. Whitehead*, 3 Dowl. Rep.
634; and see *Baddeley v. Gilmore*, 1
Meeson & W. 55. 1 Gale, 410. S. C.

^d *Oughgan v. Parish*, 4 Dowl. Rep. 29.

10 Leg. Obs. 505, 6. S. C.

^e *Prince v. Samo*, 4 Dowl. Rep. 5. 10
Leg. Obs. 238. S. C. *per Coleridge*, J.;
and see *Clay v. Stephenson*, 5 Nev. & M.
318. 3 Ad. & E. 807. 1 Har. & W. 409.
S. C.

^f *Chapm. Prac.* K. B. 2 Ed. 242. 246.

^g Stat. 1 W. IV. c. 22. § 7.

“ ized to take the examination of witnesses by any rule, order, writ,
 “ or commission, made or issued in pursuance of that act, and he
 “ and they are thereby authorized and required, to take all such
 “ examinations upon the oath of the witnesses, or affirmation in
 “ cases where affirmation is allowed by law instead of oath, to be
 “ administered by the person so authorized, or by any judge of the
 “ court wherein the action shall be depending: And if, upon such
 “ oath or affirmation, any person making the same shall wilfully and
 “ corruptly give any false evidence, every person so offending shall
 “ be deemed and taken to be guilty of perjury, and shall and may
 “ be indicted and prosecuted for such offence, in the county wherein
 “ such evidence shall be given, or in the county of *Middlesex*, if the
 “ evidence be given out of *England*: And that it shall and may be
 “ lawful for the master, prothonotary, or any other person to be
 “ named in any such rule or order as aforesaid, for taking any ex-
 “ amination in pursuance thereof, and he and they are thereby re-
 “ quired to make, if need be, a special report to the court, touch-
 “ ing such examination, and the conduct or absence of any wit-
 “ ness or other person thereon, or relating thereto; and the court
 “ is thereby authorized to institute such proceedings, and make
 “ such order and orders, upon such report, as justice may require,
 “ and as may be instituted and made in any case of contempt of the
 “ court.”^a

taken upon oath,
or affirmation.

Persons giving
false evidence, to
be deemed guilty
of perjury.

Persons ap-
pointed for tak-
ing examina-
tions to report
to the court,
upon the con-
duct or absence
of witnesses, if
necessary.

Proceedings
thereon.

The party succeeding in the action was not formerly entitled to the costs of examining his witnesses on interrogatories, or taking office copies of depositions; but the party whose witnesses were examined paid his own expense, unless it were otherwise expressed in the rule^b: and this held, as well with regard to witnesses examined abroad, as in this country^c: The reason was, that by the practice of the court of Chancery, a party applying for a commission to examine witnesses on his behalf, must pay the expenses; and unless the courts of law had adopted the same rule, with respect to the party applying for leave to examine witnesses abroad on depositions, which could not be done without the other party's consent, such consent would never have been given, but the applicant would have been driven to the expense of applying for a commission^d. But, in the Common Pleas, where the rule of court for examining witnesses by commission expressed that the depositions of witnesses at *Hamburgh* and *Lubeck* were to be taken, and

Costs of examin-
ing witnesses
on interroga-
tories.

^a Stat. 1 W. IV. c. 22. § 8.

^c *Taylor v. Royal Exchange Assurance*

^b *Stephens v. Crichton*, 2 East, 259; *Company*, 8 East, 393.

and see *Hul. Costs*, 2 Ed. 439.

^d *Same v. Same*, *id.* 393, 4.

By stat. 1 W.
IV. c. 22.

the commission was directed to persons at *Hamburg*, and the costs were ordered to abide the event of the trial, the expenses of bringing witnesses from *Lubeck* to *Hamburg* were allowed on taxation^a. And now, by the statute 1 W. IV. c. 22^b, "the costs of every rule or order to be made for the examination of witnesses, under any commission or otherwise, by virtue of that act, and of the proceedings thereupon, shall, except in the case thereinbefore provided for^c, be costs in the cause, unless otherwise directed, either by the judge making such rule or order, or by the judge before whom the cause may be tried, or by the court." Since the making of this statute, it is discretionary with the court, whether they will allow the expenses of foreign witnesses brought over for the purposes of a cause, or only the costs of a commission^d. And the costs of a commission to examine a witness abroad, are not allowed to the party who obtains the commission, although successful in the action, where the examination is more peculiarly for his benefit^e. But in order to review a taxation by the master, for disallowing the expenses of detention of a foreign witness in this country, it should be shewn that the master did not exercise his discretion on the subject, after special grounds for the allowance had been laid before him^f.

Restriction, as to the reading of examinations or depositions, without consent of the party.

As the depositions on interrogatories, however, are only taken *de bene esse*, it is enacted by the above statute^g, that "no examination or deposition, to be taken by virtue of that act, shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge, that the examinant, or deponent, is beyond the jurisdiction of the court, or dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial; in all or any of which cases, the examinations and depositions, certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions." And it has been holden, that witnesses examined under a judge's order, in expectation of their going abroad, are ex-

^a *Muller v. Hartshorne*, 3 Bos. & P. 556; and see *Tidd Prac.* 9 Ed. 813.

^b § 9.

^c *Ante*, 487.

^d *M^cAlpine v. Poles*, (*Powles, or Coles*), 1 Cramp. & M. 795. 3 Tyr. Rep. 871. 2 Dowl. Rep. 299. 7 Leg. Obs. 11, 12. S. C. Excheq.

^e *Bridges (or Brydges) v. Fisher*, 1 Bing. N. R. 510. 1 Scott, 485. 1 Hodges, 36. S. C.

^f *White v. Mayor*, 5 Tyr. Rep. 487.

^g Stat. 1 W. IV. c. 22. § 10; and as to giving depositions in evidence, see *Tidd Prac.* 9 Ed. 811, &c.

amined as much for one side as the other ; and either party may use their evidence at the trial, if it be shewn that the witnesses are abroad : but this must be proved ; and the statement in their depositions, that they are going abroad, is not sufficient for this purpose ^a.

^a Proctor v. Lainson, 7 Car. & P. 629.

CHAP. XXXVI.

Of ARBITRATION.

Power of arbitrators formerly revocable by the parties.

Cannot now be revoked, without leave of court, or judge.

IT was formerly holden, that the power of arbitrators might be determined by the *revocation* of the parties; respecting which it was laid down, that although a man were bound in a bond to stand to the arbitrament of another, yet he might countermand or revoke the power of the arbitrator; for a man could not, by his own act, make an authority, power, or warrant, not countermandable, which by the law, and of its own nature, might be countermanded^a. But now, by the act for the further amendment of the law^b, &c. reciting that it is expedient to render references to arbitration more effectual; it is enacted, that “the power and authority of any arbitrator or umpire, “appointed by or in pursuance of any rule of court, or judge’s order, or order of *nisi prius*, in any action now brought, or which “shall be hereafter brought, or by or in pursuance of any submission “to reference, containing an agreement that such submission shall “be made a rule of any of his majesty’s courts of record, shall not “be *revocable* by any party to such reference, without the leave of “the court by which such rule or order shall be made, or which “shall be mentioned in such submission, or by leave of a judge; “and the arbitrator or umpire shall and may, and is thereby required “to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such “revocation shall not afterwards attend the reference; and that the “court, or any judge thereof, may from time to time enlarge the

^a Vynior’s case, 8 Co. 82; and see Milne v. Gratrix, 7 East, 608. Oliver v. Collings, 11 East, 367. Curtis v. Potts, 3 Maule & S. 145. King v. Joseph, 5 Taunt. 452. Marsh v. Bulteel, 5 Barn. & Ald. 507. 2 Chit. Rep. 316. 1 Dowl. & R. 106. S. C. Green v. Pole, 4 Moore & P. 198. 6 Bing. 443. S. C. Skee v. Coxon, 10 Barn. & C. 463. Tidd Prac. 9 Ed. 823.

^b Stat. 3 & 4 W. IV. c. 42. § 39; and see 2 Rep. C. L. Com. 27. 79. As to submissions to arbitration in general, see Tidd Prac. 9 Ed. 819, &c.; and in what cases, and by what means, they might have been determined or revoked, with the consequences of revocation, previously to the above enactment, see *id.* 822, 3, 4. and Supplement thereto, 1830, p. 142, 3.

" term for any such arbitrator making his award." This statute applies to references of *civil* proceedings only: when criminal matters, therefore, are referred, the submission is revocable at common law^a. And the statute does not apply to arbitrators appointed in pursuance of a clause in a deed, that all disputes shall be referred to the arbitration of two persons, who are directed to choose an umpire before they proceed; but which umpire has not been appointed^b. On this statute it has been decided, that the authority of an arbitrator cannot be revoked, after he has made his award^c. And the court, or a judge, cannot make a rule or order for revoking it, without hearing both parties: Therefore, where a judge at chambers had revoked a submission to arbitration, on an *ex parte* statement, the court rescinded the order of revocation^d. This statute is general, as to the power of the court, or a judge, to enlarge the time for making an award^e. And it seems that the court, or a judge, may enlarge the time for an arbitrator to make his award, whether his authority has been revoked or not, and although the order of reference contain no power to enlarge the original term^f.

By another clause of the same statute it is enacted, that " when any reference shall have been made by any such rule or order, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with, or after the service of such rule or order: Provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct money, and

Power to compel attendance of witnesses.

^a Rex v. Bardell, 1 Nev. & P. 74.
Rex v. Shillibeer, 5 Dowl. Rep. 238.
S. C.

^b Bright v. Durnell, 4 Dowl. Rep. 756.
1 Tyr. & G. 576. S. C.

^c Phipps v. Ingram, 3 Dowl. Rep. 669.
10 Leg. Obs. 173. S. C.

^d Clarke v. Stocken, 2 Bing. N. R.

651. 3 Scott, 90. 5 Dowl. Rep. 32. 2
Hodges, 1. 12 Leg. Obs. 323. S. C.

^e Burley v. Stevens, 4 Dowl. Rep.
770. 1 Gale, 374. S. C.

^f Potter v. Newman, 1 Tyr. & G. 29.
2 Crompt. M. & R. 742. 1 Gale, 373. 4
Dowl. Rep. 504. S. C.

" payment of expenses, and for loss of time, as for and upon attendance at any trial: Provided also, that the application made to such court or judge, for such rule or order, shall set forth the county where such witness is residing at the time, or satisfy such court or judge, that such person cannot be found: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order." ^a Independently of this statute, where a defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them, the court held that he could not, by *affidavit*, bring before the court the question, whether those books related to matters in difference between the parties or not; though it was expressly sworn that the books merely related to old accounts, which had been long since settled, and which it had been agreed between them should form no part of the reference; because, by the general terms of the submission of *all* matters in difference, it was left to the discretion of the arbitrator to say what were matters in difference, and what were not ^b.

Power of arbitrators, under rule of court, &c. to administer oath.

It is also thereby further enacted, that " when, in any rule or order of reference, or in any submission to arbitration, containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are thereby authorized and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly." ^c

Mode of setting aside award.

The mode of setting aside an award is by application to the court in which the action was depending, when the reference was by rule of court, or order of *nisi prius*; or, if there were no action depending, in the court of which the submission is made a rule, under the statute

^a Stat. 3 & 4 W. IV. c. 42. § 40.

174.

^b *Arbuckle v. Price*, 4 Dowl. Rep.

^c § 41.

9 & 10 W. III. c. 15. § 1. In the King's Bench it is a rule ^a, that "when a rule to shew cause is obtained in this court, to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause:" and there is a similar rule in the Common Pleas ^b; which has also been adopted in the Exchequer ^c. This rule applies to the certificate of an arbitrator, empowered to ascertain the amount due from the defendant to the plaintiff, and to certify the same to the associate, by whom a verdict is to be entered accordingly ^d: And, in the King's Bench, where a rule to set aside an award was drawn up on reading the *affidavit*, and paper writing annexed, which was in fact a copy of the award, but was not stated to be so, the court held that the rule was bad, and could not be amended ^e. But a rule to set aside an award, made after action commenced, on account of objections to the declaration, need not refer to the declaration; as it is sufficiently before the court ^f. So, where the defect is apparent on the face of the award, it is unnecessary to state the objection in the rule *nisi* ^g. In the Common Pleas, on moving to set aside an award made under a rule of court, the rule *nisi* ought to be drawn up, on reading the *rule* under which the matter was referred ^h: And in a case which occurred in that court, previously to the above rule, it was holden that although the objections to an award ought to have been specified in the rule *nisi* to set it aside, the court was not precluded by the omission, from entering into any valid objection that might be raised to the award ^h.

Objections to award must be stated in rule *nisi*.

^a R. E. 2 Geo. IV. K. B. 4 Barn. & Ald. 539. 2 Chit. Rep. 376; and see *Allenby v. Proudlock*, 1 Har. & W. 357. 4 Dowl. Rep. 54. 10 Leg. Obs. 525, 6. S. C.

^b R. M. 10 Geo. IV. 6 Bing. 348. 3 Moore & P. 762.

^c *Smith v. Briscoe*, 11 Price, 57. *Watkins v. Phillpotts*, 1 M'Clel. & Y. 394. *Tidd Prac.* 9 Ed. 844, 5.

^d *Carmichael v. Houchen*, 3 Nev. & M. 203; and see *Whatley v. Morland*, 4 Tyr.

Rep. 255.

^e *Sherry v. Okes*, (or *Oke*), 1 Har. & W. 119. 3 Dowl. Rep. 349. 9 Leg. Obs. 379. S. C. *per Patteson, J.*; and see *Carmichael v. Hunter*, 1 Har. & W. 120. (a.)

^f *Manser v. Heaven*, 3 Barn. & Ad. 295.

^g *Christie v. Hamlet*, 5 Bing. 195. 2 Moore & P. 316. S. C.

^h *Dicas v. Jay*, 5 Bing. 281. 2 Moore & P. 448. S. C.

CHAP. XXXVII.

Of TRIALS at NISI PRIUS, and their INCIDENTS.

How considered. **I**N the present Chapter it is proposed to consider the alterations which have been made by recent statutes, rules of court, and judicial decisions, in the following incidents to trials at *nisi prius*; 1st, pleas after the last pleading, or issuing the jury process, which were formerly called pleas *puis darrein continuance*; 2dly, the hearing of counsel at the trial; 3dly, the amendment of variances by the court, or judge at *nisi prius*, under the statutes 9 Geo. IV. c. 15. and 3 & 4 W. IV. c. 42.; 4thly, the acquittal of a co-defendant, to make him a witness; 5thly, ordering witnesses out of court; 6thly, the assessment of damages by the jury, on a verdict for the plaintiff; 7thly, the judge's certificate respecting costs, or for immediate or speedy execution; and lastly, the *postea*.

Pleas after last pleading, &c.

Affidavit to accompany same.

Before whom sworn.

We have already seen ^a, that by a late statutory rule of pleading ^b, "no entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurala ponitur in respectu*, which is to be retained." In this rule there is a *proviso*, that "in all cases in which a plea *puis darrein continuance* is now by law pleadable in *banc*, or at *nisi prius*, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be:" and there is also a *proviso*, that "no such plea shall be allowed, unless accompanied by an *affidavit*, that the matter thereof arose within *eight* days next before the pleading of such plea, or unless the court or a judge shall otherwise order." An *affidavit* to verify such plea at the assizes, if sworn at the assize town, on the commission day of the assizes, before a commissioner for taking affidavits, is not good: it should be sworn before one of the judges of assize; but the judge at *nisi prius* will allow it to be resworn before him ^c. And where a plea *puis darrein*

^a *Ante*, 447, 8.

^c *Bartlett v. Leighton*, 3 Car. & P. 408.

^b R. Pl. Gen. H. 4 W. IV. reg. 2. *per Park, J.* after conferring with Mr. 5 Barn. & Ad. Append. ii 10 Bing. 464. *Baron Vaughan*.
2 Crompt. & M. 11.

continuance stated that, since the last continuance, the plaintiff had recovered a judgment for the same cause of action, and the *affidavit* to verify this plea stated the time at which the judgment was recovered, which, by reference to the *nisi prius* record, appeared to be not since the last continuance, it was holden that this affidavit did not verify the plea, and that the plea could not be received^a. But if a plea pleaded after the last pleading be good in form, and verified by *affidavit*, and there be also an *affidavit*, under the above rule, the judge at *nisi prius* will receive it, although there may be reason to believe that it is pleaded for delay^b.

When not sufficient to support plea.

When the jury are sworn, the *junior* counsel for the plaintiff opens the pleadings^c; after which, if the *onus probandi*, or proof of the issue, rest upon the plaintiff, as where the general issue is pleaded, or common plea in denial of the contract or wrong stated in the declaration, the *senior* or leading counsel states his case to the jury; and after calling and examining witnesses in support of it, the counsel for the defendant are heard; and if they call any witnesses, the plaintiff's counsel have the general reply^d. The plaintiff's counsel have also a right to begin and state the facts, although, by a rule of court, the defendant is under an obligation to admit the plaintiff's case^e. And if a court of equity direct an action of *trover* to be brought, and order that the defendant shall admit the finding and conversion of the goods, this does not entitle the defendant to begin^f. If a defendant prove payment to a plaintiff, by shewing the particulars of demand delivered under a judge's order, in which the plaintiff has credited the defendant, this is the evidence of the defendant, and entitles the plaintiff to the reply^g. But when there is a rule to pay money into court, the mere production of the rule by the defendant is not considered as evidence on his part, so as to give the right of reply to the plaintiff's.

Order in which counsel are heard on trial.

When plaintiff's or defendant's counsel entitled to begin, and have the reply.

^a *Minshall v. Evans*, 4 Car. & P. 555. *per Patterson, J.*; and see further as to pleas *pais darrein continuance*, *Tidd Prac.* 9 Ed. 847, &c. *Alder v. Park*, 5 Dowl. Rep. 16. 2 Har. & W. 78. 12 Leg. Obs. 289, 90. S. C.

^b *Corporation of Ludlow v. Tyler*, 7 Car. & P. 537.

^c On the trial of an action brought in *forma pauperis*, a king's counsel or serjeant may appear for the plaintiff alone, without a *junior*. *James v. Harris*, 7 Car.

& P. 257. *per Williams, J.*

^d *Thwaites v. Sainsbury*, 5 Car. & P. 69. *per Tindal, Ch. J.*

^e *Turberville v. Patrick*, 4 Car. & P. 557. *per Bosanquet, J.*

^f *Rymer v. Cook*, 1 Moody & M. 86. (a.); and see *Macarthy v. Smith*, 8 Bing. 145. 1 Moore & S. 227. 2 Tyr. Rep. 388. (a.) S. C.

^g R. H. 50 Geo. III. C. P. 2 Taunt. 267. 1 Car. & P. 21. n.

On several issues.

When there are several issues, some of which are incumbent on the plaintiff, and others on the defendant, it is said to be usual for the plaintiff to begin, and to prove those which are essential to his case; and then the defendant does the same, and afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs; after which, the defendant's counsel is entitled to a reply upon such evidence, in support of his own affirmatives, and the plaintiff's counsel to a general reply ^a.

On plea in abatement of non-joinder, &c.

On a plea in abatement of the non-joinder of a joint contractor, it was formerly ruled that the defendant's counsel were entitled to begin ^b: but it has since been determined, that the plaintiff's counsel in such case are entitled to begin, unless the damages are admitted ^c. And where, in *assumpsit* for work and labour, the defendant pleaded that 'the promise was made to the plaintiff and J. S. and not to the plaintiff alone,' and the replication was that 'the promise was made to the plaintiff alone, and not to the plaintiff and J. S.' it was ruled that on this issue, the plaintiff ought to begin ^d. So, in *assumpsit*, where the declaration stated that the defendant agreed to build houses according to a specification, and assigned for breach that he did not build according to the specification, and the defendant pleaded that he did so build, the court held that on this issue the plaintiff must begin, and prove that the defendant had not built according to the specification ^e. When the general issue, or common plea in denial, is not pleaded, but issue is joined on a collateral fact, as the execution of a release in *assumpsit* or *debt*, the fact of payment in *assumpsit* ^f or *debt* on bills of exchange ^g, or for money lent ^h, or on a plea of *solvit ad diem* in *debt* on bond ⁱ, the proof of which rests on the defendant, his counsel begin after the pleadings are opened, and have the general reply. So, in an action by the indorsee of a bill of exchange against the acceptor, where the defendant pleaded first, that the bill was accepted for a debt from which he was discharged under the insolvent debtors' act, of which the plaintiff, at the time of the

When issue is joined on a collateral fact.

^a 1 Stark Evid. 1 Ed. 382; and see Rosc. Evid. 2 Ed. 131, 2. Jackson v. Hesket, 2 Stark. Nl. Pri. 519. 521.

^b Fowler v. Coster, 1 Moody & M. 241. 3 Car. & P. 463. S. C. per Ld. Tenterden, Ch. J.; and see 2 Stark. Evid. 1 Ed. 2.

^c Morris v. Lotan, 1 Moody & R. 233. per Ld. Denman, Ch. J.; and see 2 Stark. Evid. 1 Ed. 2.

^d Davies v. Evans, 6 Car. & P. 619. per Parke, B.

^e Smith v. Davies, 7 Car. & P. 307; and see Shilcock v. Passman, id. 293. per Alderson, B. Scott v. Lewis, id. 247. per Coleridge, J.

^f Coxhead v. Huish, 7 Car. & P. 63.

^g Smart v. Rayner, 6 Car. & P. 721. per Parke, B.

^h Richardson v. Fell, 4 Dowl. Rep. 10. 10 Leg. Obs. 206. S. C.

ⁱ Sandford v. Hunt, 1 Car. & P. 118.

indorsement, had notice; and secondly, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act, of which the plaintiff, at the time of the indorsement, had also notice, and the plaintiff, in his replication, denied the notice stated in each of the pleas, it was ruled that on these issues, the defendant must begin, and that the *onus* of proving that the plaintiff had notice, was on the defendant ^a. So, where a party gave a check for the amount of a deposit, on a sale by auction, which sale was void, and in an action on the check, he pleaded that there was no consideration for it, and the plaintiff replied that there was consideration, it was ruled that on this issue, the defendant must begin ^b. So, in an action on a bill of exchange, by the indorsee against the acceptor, where the defendant pleaded that it was an accommodation bill, and that a blank acceptance had been filled up and applied in discharge of this and other bills, and the plaintiff replied that the defendant broke his promise without such cause as in that plea alleged, the court held that on these pleadings, the defendant was entitled to begin ^c. So, in *assumpsit* on a bill of exchange, by indorsee against acceptor, where the only plea was that the bill had been altered after acceptance, without the defendant's consent, the court held that the defendant's counsel had the right to begin, and that upon his calling for the bill, the plaintiff's counsel ought to produce it without notice ^d. To a *mandamus* to a rector, to restore a parish clerk, the rector returned that the clerk was guilty of acts of intoxication, and therefore he dismissed him; the clerk brought an action for a false return, and in his declaration recited the return, and negatived the allegations contained in it; the rector, by his plea, repeated the charges contained in the return, and the court held that, on these pleadings, the defendant had the right to begin ^e.

In an action for a *libel*, when a justification was pleaded without the general issue, it was formerly holden that the defendant was entitled to begin ^f. So, in an action of *assault* and *battery*, when there was a plea of justification only and issue thereon, the defendant's counsel had formerly a right to begin, the affirmative of the issue being on him, and the *onus* of proving damages not being

In action for libel.

Of assault, and battery.

^a Warner v. Haines, 6 Car. & P. 666. per Ld. Denman, Ch. J.

Edwards v. Jones, *id.* 688.

^b Mills v. Oddy, 6 Car. & P. 728. per Parke, B.

^c Bowles v. Neale, 7 Car. & P. 262. per Ld. Denman, Ch. J.

^e Faith v. M'Intyre, 7 Car. & P. 44.

^f Cooper v. Wakley, 1 Moody & M. 248. 3 Car. & P. 474. S. C. per Ld. Tenterden, Ch. J.

^d Barker v. Malcolm, *id.* 101; and see

Recent resolution of judges, and decisions thereon.

In covenant.

sufficient to give that right to the plaintiff's counsel ^a. A resolution, however, has been recently come to by all the judges, that 'in cases of slander, libel, and other actions for *personal injuries*, where the plaintiff seeks to recover actual damages, of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant' ^b: And accordingly, in an action for false imprisonment, where the defendant pleaded as a justification, that the plaintiff had stolen feathers, and that he was therefore imprisoned, and the plaintiff replied *de injuriâ*, &c. it was ruled that the plaintiff was entitled to begin, although there was no plea of the general issue, and the affirmative was on the defendant ^c. So where, to an action for breach of promise of marriage, the defendant did not plead the general issue, but only that the plaintiff, after the promise, conducted herself in a lewd, unchaste, and immodest manner, &c. it was decided that on this state of the pleadings, the plaintiff was entitled to begin ^d. But where the plaintiff does not go for unliquidated damages, the party on whom the affirmative lies is entitled to begin ^e: Therefore, in an action of *debt* for a penalty of 50*l.* for carrying the plaintiff to a prison under mesne process, within *twenty-four* hours, where the defendant pleaded that it was by the plaintiff's own consent, and the plaintiff replied that he did not consent, the court held that on these pleadings, the defendant should begin ^e. So, in *covenant* to recover damages for the non-performance of an agreement under seal, if the defendant plead only that the deed was obtained by fraud and covin, the affirmative of the issue being upon him, and this not being a case within the rule, his counsel has a right to begin, although the damages are uncertain, and evidence was requisite to guide the jury in forming their estimate of them ^f. And in an action of *covenant* for not repairing, &c. if the defendant plead affirmative pleas, he is in general entitled to begin ^g. In considering, however, which party ought to begin, it is not so much the form of the issue which is to be considered, as the substance and effect of it; and the judge will consider what is the substantial fact to be made out, and on whom it lies to make it out ^h: And accordingly, where in an action

^a *Bedell v. Russell*, Ry. & Mo. 293.
per Best, Ch. J.

^b *Carter v. Jones*, 6 Car. & P. 64. 1
Moody & R. 281. S. C.

^c *Atkinson v. Warne*, 6 Car. & P. 687.
per Alderson, B.

^d *Harrison v. Gould*, 7 Car. & P. 580.
per Gaslee, J. after consulting with Ld.
Abinger, Ch. B.

^e *Silk v. Humphrey*, 7 Car. & P. 14.;
and see *Burrell v. Nicholson*, 1 *Moody & R.* 304. 6 Car. & P. 202. S. C. *per Ld. Denman*, Ch. J.

^f *Reeve v. Underhill*, 6 Car. & P. 773.
per Tindal, Ch. J.

^g *Lewis v. Wells*, 7 Car. & P. 221.

^h *Soward v. Leggatt*, *id.* 613.

of *covenant* to repair, the breach was that the defendant did not repair, but suffered the premises to be ruinous, &c. and the defendant pleaded that he did repair, and did not suffer the premises to become ruinous, &c. it was ruled by Lord *Abinger*, that on this issue the plaintiff must begin ^a.

In *replevin*, where a defendant pleads property in a third person, and issue is taken thereon, he is entitled to begin ^b. And where, to an avowry for rent in arrear, it was pleaded that the tenant had let other property to the defendant at a larger rent, and it was agreed that the two rents should be set off against each other, and that in consequence a larger sum was due to the tenant than the sum distrained for by the defendant, to which there was a replication denying the agreement, it was holden that on these pleadings, the plaintiff was entitled to begin ^c. So where, in *replevin*, there was a cognizance for rent in arrear, to which there were two pleas, the one stating that a certain agreement had been entered into between the landlord and tenant, and the tenant was subsequently induced by the landlord to enter into another agreement, which second agreement was the demise in the cognizance mentioned, and that this latter agreement had been abandoned by mutual consent, before any rent became due, and the other plea was similar, except that it averred that the tenant was induced to enter into the second agreement by fraud, and there was a replication to the first plea denying the abandonment, and to the other denying the fraud, it was holden that on these pleadings, the plaintiff had the right to begin ^d.

In *replevin*.

In trespass *quare clausum fregit*, if the defendant plead, as to the coming with force and arms, and whatever else is against the peace, not guilty, and as to the residue of the trespasses a justification, which is denied by the replication ^e, the defendant has a right to begin. So, in trespass for entering the plaintiff's dwelling-house, and taking his goods, on a plea justifying the trespass by proceedings under a commission of bankrupt, and replication taking issue on the act of bankruptcy, the defendant, not having pleaded the general issue, has a right to begin ^f. So, in trespass *quare clausum fregit*, where *liberum tenementum* was pleaded, and no general issue, the defendant was holden to be entitled to begin ^g. So, in an action of trespass for taking goods,

In trespass
quare clausum
fregit, &c.

^a Soward v. Leggatt, 7 Car. & P. 613.

^e Hodges v. Holder, 3 Campb. 366.

^b Colstone v. Hiscolba, 1 Moody & R. 301. per Alderson, J.

per Bayley, J. Jackson v. Hesket, 2 Stark: Ni. Pri. 518. per Bayley, J.

^c Curtis v. Wheeler, 4 Car. & P. 196.
1 Moody & M. 493. S. C. per Ld. Ten-
terden, Ch. J.

^f Cotton v. James, 1 Moody & M. 273.
278. 3 Car. & P. 505. S. C. per Ld.
Tenlerden, Ch. J.

^d Williams v. Thomas, 4 Car. & P.
234. per Bolland, B.

^g Pearson v. Coles, 1 Moody & R. 206.
per Patteson, J.

where the defendant, without pleading the general issue, pleaded that the house was within and parcel of the parish of *M.* and that he, being a constable, took the goods under a warrant of distress for parochial rates; the replication stated that the house was not within or parcel of the parish of *M.* the plaintiff's counsel claimed the right to begin, as they had to prove the demand of the perusal and copy of the warrant; this the defendant's counsel offered to admit; and the court held that the defendant had the right to begin ^a. And he has the same right in *trespass* for shooting a dog, where there are several pleas of justification, but no plea of the general issue, although the declaration allege special damage ^b.

In ejectment.

In *ejectment*, by the heir at law against a devisee, if the defendant will admit the lessor of the plaintiff to be heir, he has a right to begin, and is entitled to the reply ^c: So, if the lessor of the plaintiff prove his pedigree, and there stop, and the defendant set up a new case in his defence, which is answered by evidence on the part of the lessor of the plaintiff, the defendant is entitled to the general reply ^d: which is also the case, where the lessor of the plaintiff claims under a will, and the defendant under a codicil thereto, the validity of which is the question between them, and the defendant admits the title of the lessor of the plaintiff under the will ^e. So in *ejectment* by lessors, claiming under several descents from a particular ancestor, when the defendant admits all the descents except the first, and claims under a will of this ancestor, the defendant is entitled to begin ^f. But where, in *ejectment*, each party claimed as heir at law, and the real question was as to the legitimacy of the defendant, who was clearly heir if legitimate, and proposed to admit that unless he were legitimate, the lessor of the plaintiff was the heir at law, it was holden that this admission did not give him the right of beginning ^g. And the defendant's counsel has no right to the general reply, unless he admits the whole *prima facie* case of the lessor of the plaintiff ^h: Therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and the counsel for the latter proved the seisin

^a Burrell v. Nicholson, 6 Car. & P. 202. 1 Moody & R. 304. S. C. per Ld. Denman, Ch. J.

^b Fish v. Travers, 3 Car. & P. 578. per Best, Ch. J.; and see Morris v. Nugent, 7 Car. & P. 572.

^c Jackson v. Heskeith, 2 Stark. Nl. Pri. 519. per Bayley, J.

^d Goodtitle d. Revett v. Braham, 4 Durnf. & E. 497; but see Doe d. Pile v. Wilson, 6 Car. & P. 301. 305, 6. per

Ld. Denman, Ch. J.

^e Doe d. Corbett v. Corbett, 3 Campb. 368. per Bayley, J. Jackson v. Heskeith, 2 Stark. Nl. Pri. 520. per Bayley, J.

^f Doe d. Wollaston v. Barnes, 1 Moody & R. 386. per Ld. Denman, Ch. J.

^g Doe d. Warren & Bray, 1 Moody & M. 166. per Vaughan, B.

^h Doe d. Tucker v. Tucker, 1 Moody & M. 536. per Bolland, B.

of the ancestor by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff, it was holden that the defendant's counsel was not entitled to the general reply ^a. On a trial at bar of a writ of *right*, the *dem*i mark having been tendered, the tenant must begin ^b. And where a rule to set aside an award is made into a special case, the counsel who objects to the award ought to begin, and have the reply ^c.

On writ of right.

In *assumpsit* for goods sold and delivered, on a plea of *coverture*, if the plaintiff elect to begin, he must go into his whole case; but if the defendant admit the debt, she is entitled to begin ^d. And, in an action of *trespass*, when the general issue is pleaded, and also special pleas, alleging a clandestine removal of goods to avoid a distress, the plaintiff, it has been said, ought to go into the whole of his case in the first instance ^e. But where there are cross demands between the plaintiff and defendant, the plaintiff need not, in the first instance, prove the whole of his account, but need only prove the balance which he claims; and if the defendant prove his set off to a larger amount, the plaintiff may then prove other parts of his account, to cover the defendant's set off ^f.

When plaintiff must go into his whole case.

When affirmative pleas of justification are put on the record, with the plea of not guilty, the plaintiff's counsel may, if they please, not only prove the facts of the declaration, but may also, in the first instance, and before the defendant's case is gone into at all, go into any evidence which goes to destroy the effect of the justification, by way of anticipating the defence; or they may, if they please, content themselves with proving the fact on the plea of not guilty, and then close their

When affirmative pleas, or justifications, are pleaded with plea of not guilty.

^a Doe d. *Pile (or Pill) v. Wilson*, 6 Car. & P. 301. 305, 6. 1 Moody & R. 323. S.C. per Ld. Denman, Ch. J.; but see Doe d. *Wollaston v. Barnes*, 1 Moody & R. 386. per Ld. Denman, Ch. J.

^b *Tooth v. Bagwell*, 3 Bing. 446. 11 Moore, 349. 2 Car. & P. 271. S. C. *Jones v. Brearly*, 5 Car. & P. 319. per *Bosanquet*, J. *Spiers v. Morris*, 9 Bing. 667. 3 Moore & S. 118. S. C.

^c *Dippins v. Marquis of Anglesea*, 2 Dowl. Rep. 647. per Ld. *Lyndhurst*, Ch. B. And see further, as to the cases in which the plaintiff's or defendant's counsel is entitled to begin, and have the reply, *Tidd Proc.* 9 Ed. 858, 9.

^d *Lacon v. Higgins*, 3 Stark. *Ni. Pri.*

178. per *Abbott*, Ch. J.; and see *Bryan v. Wagstaff*, 2 Car. & P. 125. Ry. & Mo. 329. S. C. per *Abbott*, Ch. J.

^e *Rees v. Smith*, 2 Stark. *Ni. Pri.* 31. per Ld. *Ellenborough*, Ch. J.; and see *Murray v. Butler*, 3 Esp. Rep. 105. per Ld. *Kenyon*, Ch. J. *Paterson v. Zachariah*, 1 Stark. *Ni. Pri.* 72. per Ld. *Ellenborough*, Ch. J. *Jackson v. Henketh*, 2 Stark. *Ni. Pri.* 519, 20. per *Bayley*, J. *Robey v. Howard*, *id.* 555. per *Abbott*, Ch. J. *Stansfeld v. Levy*, 3 Stark. *Ni. Pri.* 8. per *Abbott*, Ch. J.

^f *Williams v. Davies, (or Davis)*, 1 Crompt. & M. 464. 3 Tyr. Rep. 383. 1 Dowl. Rep. 647. S. C.

In action for
libel.

Time of apply-
ing for nonsuit.

Adducing
further evidence,
or recalling wit-
ness, after
plaintiff has
closed his case.

case, leaving the defendant to make out his justification as he can, and afterwards go into evidence in reply, as to the justification^a: But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved or attempted to be proved by the defendant, in support of the justifications, and they cannot be allowed to go beyond it^a. In an action for a *libel*, when the plea of not guilty is pleaded, and also special pleas of justification, the plaintiff may, in the outset, give all the evidence he intends to offer to rebut such justification; or he may do so in reply to evidence produced by the defendant: but he is not entitled to give part of such evidence in the first instance, and to reserve the remainder for reply to the defendant's case^b.

When a plaintiff's case is closed, the defendant's counsel may, if he think there is no evidence to go to the jury, ask the judge to nonsuit the plaintiff^c; but if the defendant's counsel has addressed the jury, and examined witnesses, he has then no right to address the judge for a nonsuit^c. After the plaintiff has closed his case, he is not in general permitted to adduce further evidence^d; and the judge will never allow a witness to be called back, to get rid of any difficulty on the merits, or on any thing which goes to the justice of the case^e. But the judge has a discretion, whether or not a witness shall be recalled, after the party who called him has closed his case^f. And in the exercise of this discretion, he will allow the plaintiff's counsel to recall a witness to prove a point he had before omitted^g, or to obviate objections which are beside the justice of the case, and little more than mere matter of form^h: and this has been allowed in a penal actionⁱ. In an action for work and labour, after the plaintiff had closed his case, the defendant called a witness, who stated that there had been a contract in writing between the plaintiff and defendant, which the latter produced, but it not being stamped, the judge re-

^a *Pierpoint v. Shapland*, 1 Car. & P. 447, R. *per Littledale*, J.; and see Ry. & Mo. 255. *in notis*.

^b *Browne v. Murray*, Ry. & Mo. 254. *per Abbott*, Ch. J. *Sylvester v. Hall*, *id.* 255. *in notis*.

^c *Roberts v. Croft*, 7 Car. & P. 376.

^d *George v. Radford*, 3 Car. & P. 464. 466. *per Ld. Tenterden*, Ch. J. *Rex v. Hilditch*, 5 Car. & P. 299. *per Taunton*, J.

^e *Giles v. Powell*, 2 Car. & P. 259.

per Best, Ch. J.; and see *Soulby v. Pickford*, 2 Moore & P. 545.

^f *Adams v. Bankart*, 5 Tyr. Rep. 425. 428.

^g *Brown v. Giles*, 1 Car. & P. 118. *per Park*, J.; but see *George v. Radford*, 3 Car. & P. 466. *per Ld. Tenterden*, Ch. J.

^h *Giles v. Powell*, 2 Car. & P. 259. *per Best*, Ch. J.

ⁱ ——— *v. Burgoyne*, 1 Car. & P. 120. (*b.*)

fused to receive it in evidence ; and the court of Common Pleas held that it was properly rejected, but granted a new trial. on payment of costs, in order that the defendant might have an opportunity of producing an instrument duly stamped ^a. When a defendant relies upon a legal objection, and calls evidence to support it, the plaintiff's counsel having answered the objection, the defendant is entitled to be heard on the law in reply ^b : and if the plaintiff's counsel answer the objection, and the defendant's counsel, in replying thereon, cite a case, the plaintiff's counsel will be allowed to observe on the case so cited ^c. But if certain parts of a book are used to refresh the memory of a witness for the plaintiff, and the defendant's counsel, in his address to the jury, observe upon the general state of the book, and refer to other parts of it, such observations do not give the plaintiff's counsel the right of reply ^d. Where the defendant who had begun, had closed his case, and the plaintiff's counsel had after that, in his address to the jury, read a letter which he caused one of the defendant's witnesses to prove, but neither gave it in evidence, nor adduced any evidence at all, the judge would not allow the defendant's counsel to reply ; but suggested that the plaintiff's counsel should have the letter put in and read, after which the defendant's counsel should reply ^e. If a letter, however, be shewn to a witness for the defendant, on the *voir dire*, to make out that he has an interest, and the witness be released and examined, the judge will not prevent the plaintiff's counsel from observing on this letter in reply ^f.

On objections taken during the trial.

In an action of *false imprisonment*, where the defendants had pleaded a joint plea of not guilty, the judge would not allow the counsel of each defendant either to cross examine the witnesses, or to address the jury separately ^g. And it has been ruled, that where several defendants appear by separate attornies, and have separate counsel, if they are in the same interest, only one counsel can be heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joint ^h. So, in *ejectment*, if a landlord and tenant defend by different

When several defendants appear by different attornies.

^a Fielder v. Ray, 3 Moore & P. 659.

^b Arden v. Tucker, 1 Moody & R. 192. *per* Ld. Tenterden, Ch. J.

^c Fairlie v. Denton, 3 Car. & P. 103. *per* Ld. Tenterden, Ch. J.; and see Pullen v. White, *id.* 434. *per* Best, Ch. J. Power v. Barham, 7 Car. & P. 356. *per* Coleridge, J.

^d Pullen v. White, 3 Car. & P. 434. *per* Best, Ch. J.

^e Faith v. M'Intyre, 7 Car. & P. 44.

^f Paul v. White, 5 Car. & P. 237. *per* Patterson, J.; and see Stephens v. Foster, 6 Car. & P. 289. *per* Ld. Lyndhurst, Ch. B.

^g Seale v. Evans, 7 Car. & P. 593. Neele v. Wood, 13 Leg. Obs. 157. S. C.

^h Chippendale v. Masson, 4 Campb. 174; and see Doe d. Fox v. Bromley, 6 Dowl. & R. 292. Perring v. Tucker, 1 Moody & M. 391. 4 Car. & P. 70. S. C.; but

attornies, and have different counsel, but it appears that the tenant claims no title but what he derives from the landlord, the judge at the trial will only allow one counsel to address the jury for the defence; but the party's counsel who does not address the jury, will be at liberty to cross examine, and also to call witnesses^a. And where two defendants appear and plead by the same attorney, but at the trial counsel appear for one defendant only, and the other defendant appear in person, the counsel only will be allowed to address the jury, but the defendant who has no counsel may cross examine the witnesses^b. So where, on the trial of an issue out of the court of Chancery, a person who is not a party to the record is, by order of that court, to be at liberty to attend the trial of such issue, the counsel of such person has no right to address the jury, or to call witnesses; but he may cross examine the witnesses called by both parties, and suggest points of law^c. When there are several counsel on the same side, and a *junior* has begun to examine a witness, the leader may interpose, take the witness into his own hands, and finish the examination^d. But after one counsel has brought his examination to a close, a question cannot regularly be put to the witness, by another counsel on the same side^d.

When there are several counsel on same side.

In criminal cases, when party conducts his own cause in person.

In a *criminal* case, a prosecutor conducting his cause in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury in the same manner as counsel^e. And where a defendant, in addressing the jury, is guilty of a contempt, a judge at *nisi prius* has the power of fining him^f. The defendant, on the trial of misdemeanor, cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury^g. But if he conduct his defence himself, and any point of law arise which he professes himself unable to argue, the court will hear it argued by his counsel^h. And, in a *civil* case, it has been doubted whether, if a party conduct his own cause, and

see King v. Williamson, 3 Stark. Ni. Pri. 162. Rex v. Cooke, 1 Car. & P. 321. 322. (a.) 4 Car. & P. 163. (a.) Ridgway v. Phillip, (or Phillips,) 1 Cramp. M. & R. 415. 5 Tyr. Rep. 181. 3 Dowl. Rep. 154. 9 Leg. Obs. 60. S. C. *semb. contra*.

^a Doe d. Hogg v. Tindale, 3 Car. & P. 565. 1 Moody & M. 314. S. C. *per* Ld. Tenterden, Ch. J.

^b Perring v. Tucker, 4 Car. & P. 70. 1 Moody & M. 391. S. C. *per* Tindal, Ch. J.; and see 4 Car. & P. 162. (a.)

^c Wright v. Wright, 4 Car. & P. 389. 7 Bing. 459, 60. (b.) 5 Moore & P. 319. (a.) S. C.

^d Doe v. Roe, 2 Campb. 280.

^e Rex v. Brice, 2 Barn. & Ald. 606. 1 Chit. Rep. 352. S. C.; and see Rex v. Justices of Lancashire, *id.* 602.

^f Rex v. Davison, 4 Barn. & Ald. 329.

^g Rex v. White, 3 Campb. 98. Rex v. Parkins, Ry. & Mo. 166. 1 Car. & P. 548. S. C. Shuttleworth v. Nicholson, 1 Moody & R. 254. *per* Tindal, Ch. J.

examine the witnesses, he can be allowed to have the assistance of counsel, to argue points of law ^a. Where a defendant, indicted for a nuisance, conducted his own case, the judge, at the conclusion of the case on the part of the prosecution, warned him that if he called a witness, or read any letter or paper not already in evidence, or opened new facts, the counsel for the prosecution would have a right to reply ^b. And if the counsel for the defendant, on an indictment for a misdemeanor, open new facts in his address to the jury, and afterwards decline calling witnesses to prove the facts so opened, the counsel for the prosecution is notwithstanding entitled to the general reply ^c. A prosecutor's counsel, in a case of felony, has in strictness the right of reply, though the counsel for the prisoner only call witnesses to character; but it seems that this is not a right which in practice ought to be exercised, except under very special circumstances ^d.

On opening new facts, and not calling witnesses to prove them.

When the attorney-general, or a king's counsel, appears officially as such, to conduct a prosecution on an indictment or information for a misdemeanour, he is entitled to reply, though the defendant call no witnesses ^e: but this privilege does not seem to be allowed to counsel, on a private prosecution ^f; nor to the attorney-general, where he does not prosecute in his official character ^g. In a late case however, where, in an action between subjects, the crown interfered *pro interesse suo*, and undertook the defence of the cause, and witnesses were called on both sides, the plaintiff was allowed the general reply ^h. And counsel for the crown, on shewing cause against a rule, have a right to reply to the arguments in support of it ⁱ.

Right of attorney-general to reply.

^a *Moscatti v. Lawson*, 7 Car. & P. 32.

^b *Rex v. Carllie*, 6 Car. & P. 696. 643, 4. *per Parke, J.*

^c *Rex v. Bignold*, Dowl. & R. *Ni. Pri.* 59. 4 Dowl. & R. 70. S. C.; and see *Stevens v. Webb*, 7 Car. & P. 60; but see *Crerar v. Sodo*, 1 Moody & M. 85. where it was said by Lord *Tenterden*, Ch. J. that if the defendant's counsel refuse to call a witness, to establish the facts which they have undertaken to establish, the judge may, in his discretion, permit a reply; but as to the strict right, the practice is clearly against it.

^d *Rex v. Stannard*, 7 Car. & P. 673; and for the practice to be observed on

trials for felony, where the prisoner has counsel, see *id.* 676.

^e *Rex v. Marsden*, 1 Moody & M. 439. *per* Ld. *Tenterden*, Ch. J.

^f *Rex v. Earl of Abingdon*, Peake Cas. *Ni. Pri.* 3 Ed. 310. *per* Ld. *Kenyon*, Ch. J.; but see the case of *Rex v. Smith*, *id.* (a.) *semb. contra.*

^g *Rex v. Bell*, 1 Moody & M. 440. *per* Ld. *Tenterden*, Ch. J.

^h *Rowe v. Brenton*, 3 Man. & R. 304, 5.

ⁱ *Attorney-General v. Tomsett*, 1 Gale, 147. 5 Tyr. Rep. 514. S. C. And see further, as to the hearing of counsel, *Tidd Prac.* 9 Ed. 859, &c.

Variances not amendable at trial, &c. before stat. 9 Geo. IV. c. 15.

Amendable by that statute, in cases where a variance shall appear between written or printed evidence and the record, on payment of costs.

Order for amendment to be indorsed on *postea*.

Decisions thereon.

Previously to Lord *Tenterden's* act ^a, great expense was often incurred, and delay or failure of justice took place at trials, by reason of *variances* between *writings* produced in evidence, and the recital or setting forth thereof upon the *record* on which the trial was had, in matters not material to the merits of the case; and such record could not in any case have been amended at the trial, and in some cases could not be amended at any time ^b: For remedy whereof it was enacted by the above statute, that "it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at *nisi prius*, and any court of *oyer* and *terminer* and general gaol delivery, in *England, Wales*, the town of *Berwick upon Tweed*, and *Ireland*, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanour, where any variance shall appear between any matter in *writing* or in *print* produced in evidence, and the recital or setting forth thereof upon the *record* whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the *postea*, and returned, together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

This statute, which authorizes a judge to order amendments of variances between written or printed evidence and the record, invests him with a discretion, which cannot it seems be revised by the court above ^c. And where a judgment was stated on the record as in one court, and it appeared, by the production of an examined copy, to have been obtained in another, the judge at *nisi prius* ordered the record to be amended ^d. So where, in a declaration on a bill of ex-

^a 9 Geo. IV. c. 15.

^b Preamble to stat. 9 Geo. IV. c. 15.

And for cases of *variance* between the declaration, or subsequent pleadings, and the evidence given at the trial of personal actions, &c. and in what cases they have been holden to be fatal, and in what immaterial, see *Tidd's Prac.* 9 Ed. 434, 5. (f.) & *Sup.* thereto, 1830. pp. 98, 9; and see further as to *variance*, 1 *Chit. Pl.* 5 Ed.

278, &c. 3 *Stark. Evid.* 1 Ed. 1528, &c.

^c *Parks v. Edge*, 1 *Crompt. & M.* 429. 3 *Tyr. Rep.* 364. *Parker v. Ade*, 1 *Dowl. Rep.* 643. S. C. *Rex v. Archbishop of York*, 1 *Ad. & E.* 394. 3 *Nev. & M.* 453. S. C. *Doe d. Poole v. Errington*, *id.* 646. 1 *Ad. & E.* 750. S. C.

^d *Briant v. Eicke*, 1 *Moody & M.* 359. per *Ld. Tenterden*, Ch. J.

change, the date of the bill was stated to be the 26th of *March*, when it really was the 29th, the judge, in an undefended cause, allowed the variance to be amended, under the above statute, without the payment of any costs^a. And where, in an action against a defendant for not obeying a *subpœna*, the declaration stated that the plaintiff caused to be left with the defendant, a *copy of the writ of subpœna*, the court of Common Pleas held that a judge at *nisi prius* had authority, under the above statute, to allow this allegation to be amended as follows: "a copy of so much of the said writ of subpœna as related to the said defendant."^b So, in an action on a bill of exchange by indorsee against indorser, where the bill was stated to have been drawn payable to the drawer's order, and by him indorsed to *A. B.* whereas it appeared in evidence to have been drawn in favour of *A. B.* the judge having amended the record, the court of Exchequer approved of it^c. So, in an action on an instrument declared on as a bill of exchange, the judge made an order, in an undefended cause, for the amendment of the record, by allowing the plaintiff to declare as on a promissory note, and also for the amendment of a judge's order, which had been obtained for admitting the handwriting of the defendant and the indorsers^d. And a record was amended, pending the trial, by correcting a variance between a written contract and the statement of the contract on the pleadings, although it did not appear by the record, that the contract was in writing^e. But in an action for a malicious arrest, an allegation that the defendants did not prosecute the suit complained of, but therein failed and made default, and their pledges were in mercy, &c. is not supported by proof of a discontinuance; and this variance was holden not to be such an error in the record as could be amended at *nisi prius*, under the above statute; it not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof^f. So, in *replevin*, where the defendant, in his avowry, stated that the distress was for rent in arrear, and that the plaintiff held the lands on certain terms, but, on the plaintiff's lease being put in, it appeared that he held them on other and different terms, the judge at *nisi prius* ruled that this variance was not amendable, under the statute 9 Geo. IV. c. 15^g; and also, that the act

^a *Bentzing v. Scott*, 4 Car. & P. 24.
per Park, J.

^b *Masterman v. Judson*, 8 Bing. 224.

^c *Parks v. Edge*, 1 Cromp. & M. 429.
3 Tyr. Rep. 364. *Parker v. Ade*, 1 Dowl.
Rep. 643, S. C.

^d *Moilliet v. Powell*, 6 Car. & P. 233.

^e *Lamey v. Bishop*, 4 Barn. & Ad.
479. 1 Nev. & M. 332. S. C.

^f *Webb v. Hill*, 1 Moody & M. 253. 3
Car. & P. 485. S. C. per Ld. *Tenterden*,
Ch. J.

^g *Ryder v. Malbon*, 3 Car. & P. 594.
per Park, J.

only applied to cases where some particular written instrument is professed to be set out or recited in the pleading^a. And the judge, in another case, would not allow an amendment, under the above statute, when there was a variance which would not have occurred, if common care had been used in drawing the declaration^b.

Stat. 9 Geo.
IV. c. 15.
extended by 3 &
4 W. IV. c. 42.

Preamble to
latter statute.

Amendments
may be made,
when any va-
riance appears
between the
proof, and re-
cital or setting
forth on the re-
cord, of any con-
tract, &c. in any
particular not
material to the
merits of the
case, and by
which the oppo-
site party cannot
have been pre-
judiced.

The above statute being confined to such variances only as appeared between any matter in *writing* or in *print* produced in evidence, and the recital or setting forth thereof on the *record* whereon the trial was pending^c, was extended by the statute 3 & 4 W. IV. c. 42^d; whereby, after reciting that great expense was often incurred, and delay or failure of justice took place at trials, by reason of *vacancies*^e, as to some particular or particulars, between the *proof* and the *record*, or setting forth on the record, or document on which the trial was had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the misstatement of which the opposite party could not have been prejudiced, and the same could not in any case be amended at the trial, except where the variance was between any matter in *writing* or in *print* produced in evidence, and the *record*; and that it was expedient to allow such amendments as thereafter mentioned, to be made on the trial of the cause^f; it is enacted, that "it shall be lawful for
"any court of record holding plea in civil actions, and any judge
"sitting at *nisi prius*, if such court or judge shall see fit so to do, to
"cause the record, writ, or document, on which any trial may be
"pending before any such court or judge, in any civil action, or in
"any information in the nature of a *quo warranto*, or proceedings on
"a *mandamus*, when any variance shall appear between the proof and
"the recital or setting forth on the record, writ, or document, on
"which the trial is proceeding, of any contract, custom, prescription,
"name, or other matter, in any particular or particulars in the judg-
"ment of such court or judge not material to the merits of the case,
"and by which the opposite party cannot have been prejudiced in the
"conduct of his action, prosecution, or defence, to be forthwith
"amended by some officer of the court or otherwise, both in the part

^a *Ryder v. Malbon*, 3 Car. & P. 594.
per Park, J.

^b *Jelf v. Oriel*, 4 Car. & P. 22. *per Ld. Tenterden*, Ch. J.; but see *Parks v. Edge*, 1 Crompt. & M. 429. *Parker v. Ade*, 1 Dowl. Rep. 643. S. C.; and see *Brown v. Dean*, 2 Nev. & M. 332. *per Denman*, Ch. J.

^c *Brooks v. Blanshard*, 1 Crompt. & M. 779. 3 Tyr. Rep. 844. S. C.

^d § 23. and see 2 Rep. C. L. Com. 35, &c. 85, &c.

^e This is evidently a misprint, for "*vacancies*."

^f Preamble to stat. 3 & 4 W. IV. c. 42. § 23.

“ of the pleadings where such variance occurs, and in every other
 “ part of the pleadings which it may become necessary to amend, on
 “ such terms, as to payment of costs to the other party, or postponing
 “ the trial to be had before the same or another jury, or both pay-
 “ ment of costs and postponement, as such court or judge shall think
 “ reasonable: and in case such variance shall be in some particular or
 “ particulars in the judgment of such court or judge not material to
 “ the merits of the case, but such as that the opposite party may have
 “ been prejudiced thereby in the conduct of his action, prosecution,
 “ or defence, then such court or judge shall have power to cause the
 “ same to be amended, upon payment of costs to the other party, and
 “ withdrawing the record, or postponing the trial as aforesaid, as such
 “ court or judge shall think reasonable; and after any such amendment,
 “ the trial shall proceed, in case the same shall be proceeded with, in
 “ the same manner in all respects, both with respect to the liability of
 “ witnesses to be indicted for perjury and otherwise, as if no such
 “ variance had appeared: and in case such trial shall be had at *nisi*
 “ *prius*, or by virtue of such writ as aforesaid, the order for the
 “ amendment shall be indorsed on the *postea*, or the writ, as the case
 “ may be, and returned, together with the record or writ, and there-
 “ upon such papers, rolls, and other records of the court from which
 “ such record or writ issued, as it may be necessary to amend, shall
 “ be amended accordingly; and in case the trial shall be had in any
 “ court of record, then the order for amendment shall be entered on
 “ the roll, or other document, upon which the trial shall be had: pro-
 “ vided, that it shall be lawful for any party who is dissatisfied with
 “ the decision of such judge at *nisi prius*, sheriff, or other officer, re-
 “ specting his allowance of any such amendment, to apply to the
 “ court from which such record or writ issued, for a new trial upon
 “ that ground; and in case any such court shall think such amend-
 “ ment improper, a new trial shall be granted accordingly, on such
 “ terms as the court shall think fit, or the court shall make such other
 “ order as to them may seem meet.”

Terms of
amendment.

Trial to pro-
ceed, after
amendment, as
if no variance
had appeared.

Order for
amendment to
be indorsed on
postea, and en-
tered on roll.

Party dissatis-
fied with deci-
sion of judge,
may apply to
court for a new
trial.

Under this statute, the judge at *nisi prius* will in general amend any variance, which does not go at all to affect the matter really in dispute between the parties, and which was not likely to mislead the opposite party^a: Therefore where, in *assumpsit* on the warranty of a horse, a general warranty of soundness was declared on, and a warranty “except in one foot” was proved, the judge allowed the declaration to be amended, the real dispute between the parties being whether

^a Hemming v. Parry, 6 Car. & P. 580. per Alderson, B.

the horse was a roarer^a. So where a contract, by which *A.* guaranteed to *B.* the amount of a debt to be contracted with *B.* by *C.* was described in pleading as a promise to *pay* the debt to be so contracted, the court sanctioned an amendment ordered at *nisi prius*, by substituting "guarantee" for "pay."^b So where, in *trespass* for breaking the plaintiff's close called *Clover Hill*, the defendants pleaded not guilty, and that the close was not the plaintiff's, and the real name of the close appeared to be *Clover Moor*, the judge ordered the record to be amended, by inserting the word *Moor* instead of *Hill*^c. And where it appeared, on the trial of an *ejectment*, that the parish was mis-stated in the declaration, the judge allowed it to be amended, although the *ejectment* was for a forfeiture^d. But where the declaration in *ejectment* was on a supposed joint demise by *A.* and *B.* and it appeared in evidence that *A.* and *B.* had not such an interest that they could join in a demise to the nominal plaintiff, the judge at *nisi prius* refused to amend the declaration, under the above statute, by severing the demises^e. So, if several defendants are sued in *debt*, and the evidence do not fix all of them, the plaintiff must be nonsuited; and the judge will not allow the declaration to be amended, by striking out the names of those defendants who are not affected by the evidence^f. So, where *A.* covenanted to pay *B.* 270*l.* on the 15th *December*, with interest up to that time, and not having done so, *B.* brought an action of *debt*, laying his damages at 10*l.* it was holden that *B.* could not recover any more than the principal, with the interest up to the 15th *December*, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum; and the judge at the trial would not order the declaration to be amended, by inserting a larger sum than 10*l.* as the damages^g. So where, in an action on the case for diverting a water-course, a party who had a right to the use of running water, as an owner of adjoining lands, had appropriated it, and by his declaration claimed the right thereto as the owner of a mill not *twenty* years old, this was holden to be bad, and the judge at the trial would not allow the declaration to be amended^h. And even if the

^a *Hemming v. Parry*, 6 Car. & P. 580.
per *Alderson*, B.

^b *Hanbury v. Ella*, 3 Nev. & M. 438.
1 Ad. & E. 61. S. C.

^c *Howell v. Thomas*, 7 Car. & P. 342.
per *Coleridge*, J.

^d *Doe d. Marriott v. Edwards*, 6 Car.
& P. 208. 1 Moody & R. 319. S. C. per
Parke, J.

^e *Doe d. Poole v. Errington*, 1 Moody
& R. 343. 3 Nev. & M. 646. 1 Ad. &
E. 750. S. C. per *Taunton*, J.

^f *Cooper v. Whitehouse*, 6 Car. & P.
545. per *Alderson*, B.

^g *Watkins v. Morgan*, 6 Car. & P.
661. per *Littledale*, J.

^h *Frankum v. Earl of Falmouth*, 6 Car.

jury find the plaintiff's right specially, and it be indorsed on the *postea*, under the twenty-fourth section of the statute, the court above will not give judgment for the plaintiff on that finding; because, if the plaintiff had stated his right properly, the defendant might have pleaded differently^a. So, in *trespass* for taking 'mirrors and handkerchiefs,' where the defendant justified the taking of the mirrors, but by mistake omitted the taking of the handkerchiefs, the judge held that this omission could not be amended at the trial^b. And a judge sitting at *nisi prius* has no power, under the above statutes, to order an amendment of the award of the *venire facias*, on the *nisi prius* record^c.

By another clause of 3 & 4 W. IV. c. 42^d, "the said court or judge shall and may, if they or he think fit, in all such cases of *variance*, instead of causing the record or document to be amended as afore-said, direct the jury to find the fact or facts according to the evidence; and thereupon such finding shall be stated on such record or document, and notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case." On this latter clause, where, in an action against the sheriff, for allowing a defendant to escape after he had been arrested on mesne process, it was proved at the trial, that an opportunity only had offered itself of making the arrest, but that the sheriff had not availed himself of it by arresting the party, the judge, on an application for leave to amend the declaration, directed the jury to find the facts specially, reserving the question of the plaintiff's right to amend, for the opinion of the court^e. And where, in an action on the *case*, against the defendants as *carriers*, for negligence, it appeared from the evidence that the defendants, if liable at all, were liable as *wharfingers*, upon a contract to forward, and just before the plaintiff's counsel commenced his reply, he applied to the judge to amend the declaration, which however the learned judge refused to do, but left it to the jury to say whether there was a contract to forward, or a contract to carry, and they found

Power of court or judge to direct facts to be found specially.

& P. 529. *per Alderson*, B. 4 Nev. & M. 330. S. C.; and see *Kirby v. Simpson*, 3 Dowl. Rep. 791. 10 Leg. Obs. 334. S. C.

^a *Id. ibid.*

^b *John v. Currie*, 6 Car. & P. 618. *per Parke*, B. And see *Young v. Fewson*, 13 Leg. Obs. 396. *per* Ld. Denman, Ch. J.

^c *Adams v. Power*, 7 Car. & P. 76. *per Bolland*, B.

^d § 24.

^e *Guest v. Everest*, 9 Leg. Obs. 75; and for the decision of the court thereon, see *Geast (or Guest) v. Elwes*, 6 Nev. & M. 433. 2 Har. & W. 34. S. C.

that there was a contract to forward, upon which the judge directed the verdict to be entered for the defendant, but the special finding to be indorsed on the *postea*, that the court might proceed thereon according to the above statute; the court allowed the amendment, and granted a new trial, on payment of costs, observing that the learned judge might have allowed the amendment, and postponed the trial to a future day, pursuant to § 23. of that statute^a. Sp, in an action on a bill of exchange, where the defendant had omitted to state the period at which the bill became due, and at the trial of the cause at *nisi prius* the judge refused to allow the defendant to amend, and directed a nonsuit, the court set aside the nonsuit, and granted leave to amend, on payment of costs, the defendant being allowed to plead *de novo*^b. The court has no power to impose any terms upon the party for whom judgment is ordered to be entered, under this section^c.

Acquittal of co-defendant, to make him a witness.

It was formerly holden, that the acquittal of one of several defendants was not a matter of right, which the defendant's counsel could claim; it being discretionary with the judge at *nisi prius*, whether he would direct the acquittal of the defendants against whom there was no evidence, at the close of the plaintiff's case, for the purpose of making them witnesses for the co-defendants^d. But now, the judges have resolved that those defendants against whom there is no evidence, shall be immediately acquitted; and that their acquittal shall not be delayed, till the case of the other defendants is gone into^e. In *assumpsit*, where one defendant pleads a plea operating only in his personal discharge, a verdict may be taken for him on that plea, and he may then be examined as a witness for his co-defendants^f. And where the defendants *A.* and *B.* were sued on a bill of exchange accepted by them while in partnership, and *B.* pleaded his bankruptcy

^a Parry v. Fairhurst, 2 Crompt. M. & R. 190. 5 Tyr. Rep. 685. S. C.

^b Pullen v. Seymour, 5 Dowl. Rep. 164. 12 Leg. Obs. 292. S. C.

^c Geast (or Guest) v. Elwes, 6 Nev. & M. 433. 2 Har. & W. 34. S. C.

^d Davis v. Living, Holt, Nl. Pri. 275. per Gibbs, Ch. J.; and see Huxley v. Berg, 1 Stark. Nl. Pri. 98, 9. where Ld. Ellenborough held that a defendant, against whom no evidence had been given before the defendant closed his case, ought not to

be acquitted before the whole of his case was ready for the jury. Wright v. Paulin, Ry. & Mo. 128, S. P.; and see 1 Moody & M. 197, 8. (a.) Wynne v. Anderson, 3 Car. & P. 596.

^e Child v. Chamberlain, 6 Car. & P. 213. 1 Moody & R. 318. S. C. per Parke, J.; and see King v. Baker, 2 Ad. & E. 333.

^f Bate v. Russell, 1 Moody & M. 332. per Parke, J.

and certificate, and the plaintiff entered a *nolle prosequi* as to him, *B.* was holden, after releasing his interest in the surplus of his effects, to be a competent witness for *A.* ^a. On an indictment against several persons, the counsel for the prosecution has a right, before opening his case, to the acquittal of any defendant he intends to call as a witness ^b.

On indictment against several persons.

It is sometimes deemed advisable to examine witnesses separately, and out of the hearing of each other, with a view to obviate the danger of a concerted story among them, and to prevent the influence which the account given by one may have upon another ^c: In such case it is usual to order the witnesses out of court, with notice that they will not be examined if they remain ^c. And either party, at any period of the cause, has a right to require that the unexamined witnesses should be out of court ^d. But the defendant's attorney, who has been subpoenaed on the part of the plaintiff, may, at the desire of his counsel, remain in court during the trial of the cause, although an order has been made for the witnesses on both sides to withdraw ^e. And where a witness remains in court after an order for the witnesses to withdraw, the judge may still allow him to be examined, subject to observation on his conduct, in disobeying the order ^f. If a witness come into court, and hear some of the evidence, after the witnesses have been ordered out of court, it is entirely in the discretion of the judge, whether he shall be examined or not; and this is so in the Exchequer, as well as in other courts, the only difference being that it is confined in that court to revenue cases, in which the rule is strict, that such witnesses cannot be examined ^g. And where the witnesses had been all ordered out of court, but one of them came into court again, and heard the evidence of another witness, the witness who had so come back into court was allowed to be examined as to such facts only as had not been spoken to by any other witness ^h.

Ordering witnesses out of court.

^a *Affalo v. Fourdrinier*, 6 Bing. 306. 1 Moody & M. 334, 5. (a.) S. C.; and see *Graham v. Wichelo*, 3 Tyr. Rep. 201. *Tidd Prac.* 9 Ed. 361.

^b *Rex v. Rowland*, Ry. & Mo. 401.

^c 1 Phil. Evid. 4 Ed. 282; and see *Bac. Abr. tit. Evidence*, E. 1 Stark. Evid. 133.

^d *Southey v. Nash*, 7 Car. & P. 632.

^e *Everett v. Lowdham*, 5 Car. & P. 91. *per Bosanquet*, J.

^f *Rex v. Colley*, 1 Moody & M. 329.

per Littledale, J. *Parker v. McWilliam*, 4 Moore & P. 480. 6 Bing. 683. S. C. *Rex v. Wylde*, 6 Car. & P. 380. *per Parks*, J. *accord.* *Cook v. Nethercote*, *id.* 741. *per Alderson*, B.; but see *Attorney-General v. Bulpit*, 9 Price, 14. *contra*, in *Excheq.*

^g *Thomas v. David*, 7 Car. & P. 350. *per Coleridge*, J.

^h *Beamon v. Ellice*, 4 Car. & P. 585. 586, 7.

Damages in
personal actions.

How ascer-
tained.

When merely
nominal.

. It will next be proper to notice the recent decisions of the courts on the subject of *damages*, in personal actions upon *contracts*, and for *wrongs* independently of contract; and, as incident thereto, in what cases *interest* was formerly, and is now recoverable, and in what not ^a.

The *damages* in *personal* actions ^b are either admitted by the defendant, on a confession of the action ^c; assessed by the jury, on the trial of an issue, or execution of a writ of inquiry ^d; ascertained by the master or prothonotaries, in an action on a bill of exchange or promissory note ^e, &c.; or increased by the court, after verdict in an action for a *mayhem*, on view of the plaintiff ^f. In some cases, however, the damages are merely *nominal*; as in an action of *debt* for a penalty, at common law ^g: and in general it seems, that wherever the plaintiff has evidently entitled himself to a verdict for some damages, but the jury, being unable to ascertain the amount, find a verdict for the defendant, the court will permit the plaintiff to enter a verdict for a nominal sum ^h. And, in an action against the sheriff for not selling within a reasonable time after a seizure under a *feri facias*, the plaintiff can recover nominal damages only, unless an actual injury be proved ⁱ. But an acknowledgement of a debt, without specifying any amount, is not sufficient to entitle the creditor to nominal damages, on a count upon an account stated ^k.

^a These decisions are for the most part additional to those which are collected in *Tidd Prac.* 9 Ed. 870, &c.

^b For the damages formerly recoverable in *real* and *mixed* actions, see *Tidd Sup.* 1838. p. 6, 7. (m.) 10, 11, 12.

^c *Tidd Prac.* 9 Ed. 559, &c.

^d *Id.* 573, &c.

^e *Id.* 570, &c.

^f *Id.* 888. 896; and see *Tidd Prac.* 9 Ed. 870, &c.

^g *Wilde v. Clarkson*, 6 Durnf. & E. 308; but see *Ld. Lonsdale v. Church*, 2 Durnf. & E. 388. *Blackmore v. Flemyng*, 7 Durnf. & E. 446.

^h *Feize v. Thompson*, 1 Taunt. 121; and see *Cotterill v. Hobby*, 4 Barn. & C. 465. 6 Dowl. & R. 551. S. C. *Dixon v. Deveridge*, 2 Car. & P. 109. *per Abbott*, Ch. J. *Young v. Spencer*, 10 Barn. & C. 145. *Walker v. Moore*, *id.* 416. *Staniforth v. Lyall*, 7 Bing. 169. *Marzetti v. Williams*, 1 Barn. & Ad. 415. 423, &c. *Godefroy v. Jay*, 7 Bing. 413. 5 Moore &

P. 284. S. C. *Clendon v. Dinneford*, 5 Car. & P. 13. *per Patteson*, J. *Dickenson v. Hatfield*, *id.* 46. 1 Moody & R. 141. S. C. *per Ld. Tenterden*, Ch. J. *Proudlove v. Twemlow*, 1 Crompt. & M. 326. 3 Tyr. Rep. 260. S. C. *Harris v. Jones*, 1 Moody & R. 173. *per Tindal*, Ch. J. *Tidd Prac.* 9 Ed. 879.

ⁱ *Bales v. Wingfield*, 2 Nev. & M. 831.

^k *Bernasconi v. Anderson*, 1 Moody & M. 183. *Van Wart v. Woolley*, *id.* 520. *per Ld. Tenterden*, Ch. J.; and see *Early v. Bowman*, 1 Barn. & Ad. 889. *Kirton v. Wood*, 1 Moody & R. 253. *per Tindal*, Ch. J. *Leeson v. Smith*, 4 Nev. & M. 304. *Dodson v. Mackey*, *id.* 327; and see further, as to *nominal* damages, *Evans v. Lewis*, 3 Dowl. Rep. 819. 10 Leg. Obs. 332. S. C. *Ante*, 316, 17. *Tripp v. Thomas*, 3 Barn. & C. 427. *Lethbridge v. Mytton*, 2 Barn. & Ad. 772. *Tidd Prac.* 9 Ed. 879.

In *assumpsit* or *covenant*, for non-payment of money, the measure of damages is the sum agreed to be paid to the plaintiff; or, if not ascertained by the contract, the sum proved to be due to him at the time of bringing the action, with or without *interest*, according to the nature of the demand, and manner in which it arose ^a.

It was formerly holden, that interest was payable on all liquidated sums, from the instant the principal became due ^b: and accordingly, interest was allowed for money lent to ^c, or paid for the defendant ^d, or on an account stated ^e. But it was not recoverable in an action for goods sold and delivered ^f, or for work and labour ^g; and it was afterwards settled, that interest was recoverable in *four* cases only: 1st, where there was a contract in writing for the payment of money on a certain day, as on bills of exchange, or promissory notes, &c.; 2dly, where there had been an express promise to pay interest; 3dly, where, from the course of dealing between the parties, such a promise might have been inferred; or, 4thly, where it could be proved that the money had been used, and interest actually made of it ^h: and therefore it was holden, that interest was not recoverable for money lent generally, without a contract for it, expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for payment of the principal money at a given time ⁱ. So, interest was not recoverable on an account stated ^k, unless it had been paid on former balances ^l; or on money had and received, unless there was some express promise to pay interest ^m, or something from which such a promise might have been inferred; or it was proved

On contract to pay money.

In what cases interest was formerly recoverable, and in what not.

^a Tidd *Prac.* 9 Ed. 871.

^b *Blaney v. Hendricks*, 2 Blac. Rep. 761. 3 Wils. 205. S. C.

^c *Vernon v. Cholmondeley*, Bunb. 119. *Blaney v. Hendricks*, 2 Blac. Rep. 761. 3 Wils. 205. S. C.; and see *Calton v. Bragg*, 15 East, 224, 5.

^d *Trelawney v. Thomas*, 1 H. Blac. 303.

^e *Blaney v. Hendricks*, 2 Blac. Rep. 761. 3 Wils. 205. S. C.

^f *Pinock v. Willett*, Barnes, 228; and see *Blaney v. Hendricks*, 2 Blac. Rep. 761. 3 Wils. 205. S. C.

^g *Trelawney v. Thomas*, 1 H. Blac. 303; and see *Milsom v. Hayward*, 9 Price, 134.

^h *De Havilland v. Bowerbank*, 1 Campb. 50; and see *Nichol v. Thompson*, *id.* 52.

ⁿ. *Rogers v. Boehm*, 2 Esp. Rep. 702. 704. *Willis v. Commissioners of Appeal in Prize causes*, 5 East, 22. 1 Smith R. 399. S. C. *Hamel v. Abel*, 4 Taunt. 298. *Bruce v. Hunter*, 3 Campb. 467. *Goodechild v. Fenton*, 3 Younge & J. 481. *Foster v. Weston*, 4 Moore & P. 589. 6 Bing. 709. S. C.

ⁱ *Calton v. Bragg*, 15 East, 223. Page *v. Newman*, 9 Barn. & C. 378. 4 Man. & R. 305. S. C.

^k *Chalie v. Duke of York*, 6 Esp. Rep. 45. *Nichol v. Thompson*, 1 Campb. 52. *n.*

^l *Nichol v. Thompson*, 1 Campb. 52. *n.*; and see *Hamel v. Abel*, 4 Taunt. 298.

^m *Hicks v. Mareco*, 5 Car. & P. 498. *per* Ld. *Lyndhurst*, Ch. B.

Jury empowered to allow interest upon all debts.

that the money had been used by the defendant, and interest made of it^a. But now, by the late act for the further amendment of the law^b, &c. it is enacted, that "upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing; so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand, until the term of payment: provided, that interest shall be payable in all cases, in which it is now payable by law." In an action however, on an attorney's bill, where the plaintiff gave notice, pursuant to the above act, that he should claim interest from the date of the notice, and after the writ was issued, the bill was referred to taxation, at the instance of the defendant, no terms being made as to the allowance of interest, the court held that the plaintiff could not afterwards have an assessment of damages, for the purpose of recovering the interest^c.

Interest not formerly recoverable in trover, or trespass *de bonis asportatis*, beyond value of the goods.

Nor in actions on policies of assurance.

In actions of *trover*, or *trespass de bonis asportatis*, interest was not formerly recoverable, as such, beyond the amount of the value of the goods, at the time of the conversion or seizure; though, in *trover* for a bill of exchange, it was holden that damages were to be calculated according to the amount of the principal and interest due upon the bill, at the time of the demand and refusal to deliver it up^d. In actions on *policies* of assurance, it was formerly usual to allow interest^e; but this practice having been disapproved of^f, it was afterwards settled, that in an action on a policy, the plaintiff could not recover interest upon the sum insured^g, unless evidence were given that he had applied to the underwriter to settle the loss, soon after it happened, and notified to him the ground of such application^h. But now, by the

^a *De Havilland v. Bowerbank*, 1 Campb. 50; and see *Crockford v. Winter*, *id.* 124. 129. *Walker v. Constable*, 1 Bos. & P. 268. *Tippenden v. Randall*, 2 Bos. & P. 467. 472. *Depeke v. Munn*, 3 Car. & P. 112. *Goodchild v. Fenton*, 3 Younge & J. 461; and see *Tidd Prac.* 9 Ed. 871, 2. *Tidd Sup.* 1680. p. 158, 4.

^b 3 & 4 W. IV. c. 42. § 28; and see 4 Rep. C. L. Com. 38, 4. 46.

^c *Berrington v. Phillips*, 1 Meeson &

W. 48. 1 Tyr. & G. 322. 1 Gale, 404. 4 Dowl. Rep. 758. S. C.

^d *Mercer v. Jones*, 3 Campb. 477; and see *Paine v. Pritchard*, 2 Car. & P. 558.

^e *Kingston v. McIntosh*, 1 Campb. 518.

^f *De Bernales v. Fuller*, 2 Campb. 437.

^g *Kingston v. McIntosh*, 1 Campb. 518.

^h *Bain v. Case*, 3 Car. & P. 406. 1 Moody & M. 262. S. C.; and see further, as to the cases in which interest is or is not recoverable, *Tidd Prac.* 9 Ed. 871, &c.

late act for the further amendment of the law ^a, &c. "the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of *trover*, or *trespass be bonis asportatis*; and over and above the money recoverable in all actions on policies of assurance, made after the passing of that act."

In actions of *trover*, or *trespass* for carrying away goods, and on policies of assurance, the jury may give damages in nature of interest.

The rate of interest in general allowed on debts contracted in this country, is five pounds *per cent. per annum*, as well in courts of equity as at law ^b: But, by the *Bank act* ^c, a higher rate of interest is allowed to be taken or secured, according to the agreement of the parties, in discounting, negotiating, or transferring a bill of exchange, or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run. It should also be observed that, by the statute 3 & 4 W. IV. c. 27 ^d, "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

Rate of interest.

Arrears of rent, or interest, not recoverable for more than six years.

In *assumpsit* or *covenant*, when the contract is not for the payment of money, but for the doing or forbearing of some other act, the damages depend on the nature of the contract, and whether it relates to the *person*, or to *real* or *personal* property. In *assumpsit*, on a contract for the purchase of a *real* estate, to which the title proves defective without any fraud or fault of the vendor, the vendee is in general entitled to no satisfaction for the loss of his bargain ^e. And where a vendor, from incapacity to make out a title, fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages, expenses incurred previously to entering into the contract; nor the expense of a survey of the estate; nor the expense of a conveyance, drawn in anticipation of a completion of the purchase; nor the *extra* costs of a chancery suit, touching the purchase, in

When contract is not for the payment of money.

On contract for sale of real estate, when title proves defective.

^a Stat. 3 & 4 W. IV. c. 42. § 29.

^d § 42.

^b 5 Ves. 808. Chit. Bills, 5 Ed. 540; and see *Sykes v. Harrison*, 1 Bos. & P. 29. Tidd *Prac.* 9 Ed. 874.

^e *Flureau v. Thornhill*, 2 Blac. Rep. 1078; and see *Walker v. Moors*, 10 Barn. & C. 416. Tidd *Prac.* 9 Ed. 875.

^c 3 & 4 W. IV. c. 98. § 7.

In action for not accepting goods bought.

When work is not done, according to contract.

In action on agreement not under seal, with penalty for its non-performance.

In action on replevin bond.

which the vendor was defeated; nor losses sustained by the purchaser, in the resale of stock purchased for the estate^a; but he is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose, and interest on his deposit money^a. And upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit money, and money paid by the purchaser to the auctioneer for the purchaser's moiety of the auction duty, may be recovered; but expenses of investigating the title cannot be recovered, without proof of a written contract binding on the vendor; nor interest upon the deposit^b. In an action for not accepting goods bought, the jury are not bound to give the full value of the goods; but the measure of damages is the difference between the price which the defendant had contracted to pay, and the market price at the time when the contract was broken^c, or what the goods afterwards sold for^d. And when a party engages to do certain work on specified terms, and in a specified manner, but in fact does not perform the work so as to correspond with the specification, he is not of course entitled to recover the price agreed upon; nor can he recover according to the actual value of the work, as if there had been no special contract; but what the plaintiff in such case is entitled to recover is the price agreed upon, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification^e. In an action on an agreement not under seal, where the agreement contained a clause that the party neglecting to comply with his part of the agreement, should pay the sum of £100, mutually agreed upon to be the damages ascertained and fixed on breach thereof, Lord *Tenterden*, Ch. J. held that the party making default was not liable beyond the damage actually sustained^f. In an action on a *replevin* bond, the sureties are only liable for the value of the

^a *Hodges v. Earl of Litchfield*, 1 Bing. N. R. 492. 1 Scott, 448. 1 *Hodges*, 40. S. C.

^b *Gosbell v. Archer*, 4 Nev. & M. 485. 2 Ad. & E. 500. S. C.

^c *Boorman v. Nash*, 9 Barn. & C. 145. *De Sewhanberg v. Buchanan*, 5 Car. & P. 343. per *Tindal*, Ch. J.

^d *Smee v. Huddleston*, T. 8 Geo. III. C. P. Say. Dam. 49.

^e *Thornton v. Place*, 1 Moody & R. 218, 19. per *Park*, J.; and see *Orme v.*

Broughton, 10 Bing. 533. 4 Moore & S. 417. S. C. *Rosc. Evid.* 2 Ed. 221, 2.

^f *Randal v. Everest*, 1 Moody & M. 41. 2 Car. & P. 577. S. C.; and see *Staniforth v. Lyall*, 7 Bing. 169. *Hornor v. Graves*, 5 Moore & P. 768. 7 Bing. 735. S. C.; but see *Crisdee v. Bolton*, 3 Car. & P. 240. *Icely v. Grew*, 6 Nev. & M. 467; and see *Kemble v. Farren*, 3 Moore & P. 425. 6 Bing. 141. 3 Car. & P. 624. (a.) S. C.

goods seized, and double costs; and if that value exceed the amount of rent due, they will only be liable for the rent^a. In an action against an *heir*, on the bond of his ancestor, the defendant pleaded *riens per descent*, and the plaintiffs replied, under the statute, that the defendant had assets, &c. before the action commenced, concluding with a verification; and the jury having assessed the damages, under the condition of the bond, at a larger amount than the amount of the lands descended, the court held that the execution for debt and costs must be confined to the value of the lands descended^b.

Against heir, on bond of ancestor.

In an action brought in *England*, to recover the value of a given sum *Jamaica* currency, upon a judgment obtained in that island, the value is that sum in sterling money which the currency would have produced, according to the actual rate of exchange between *Jamaica* and *England*, at the date of the judgment^c. And where the defendants were under an agreement to pay the plaintiffs the value of certain *billetes*, issued by the *Peruvian* government, as a compensation for injury done to the plaintiffs, and purporting to be of the value of 16,011 dollars, the court held that the prothonotary was to estimate the value, as the value of a bill of exchange for the same number of dollars, on a house of respectability at *Lima*, although the *billetes* were at a great discount^d.

On foreign judgment, for value of currency, &c.

In an action of *trover*, the general rule is, that the damages should be the value of the thing taken; and if the defendant only plead that he did not convert the goods, his counsel will not be allowed to cross examine the plaintiff's witnesses, to shew, in mitigation of damages, that the goods taken really belonged to a third person^e. In *trover* for a lost bank note, the acceptance of part of the produce does not affirm the taking, so as to waive the *tort*; but the amount received will go in reduction of damages^f. And where *A.* as a cloak for an usurious loan, purchased malt of *B.* for ready money, which he immediately resold to *B.* at an advanced price payable in bills, the malt to be held by *A.* as a security; *B.* having demanded the malt, without paying the bills, the court held that he might recover in *trover* the full value of the malt, without deduction

In trover.

^a Hunt v. Round, 2 Dowl. Rep. 556.
8 Leg. Obs. 428, 9. S. C. per Patteson, J.

^b Brown v. Shuker, 2 Crompt. & J. 311. 2 Tyr. Rep. 320. S. C.

^c Scott v. Bevan, 2 Barn. & Ad. 78.
5 Moore & P. 446. (a.) S. C. cited.

^d Delegal v. Naylor, 7 Bing. 460. 5 Moore & P. 448. S. C. And see further, as to damages in actions on contracts, Tidd Prac. 9 Ed. 871, &c.

^e Finch v. Blount, 7 Car. & P. 478.

^f Burn v. Morris, 4 Tyr. Rep. 485. 2 Crompt. & M. 579. S. C.

or *recouper* of the money received by him upon the simulated sale ^a. But, in an action of *trover*, the plaintiff cannot it seems recover damages for the deterioration of the property, while detained by the defendant ^b. If *trover* be brought by the assignees of a bankrupt against the sheriff, to try the validity of a sale under an execution, and it appear that the defendant had a probable cause for taking the goods, and that they were fairly sold for as much as they would justly have produced if sold under the commission, it often happens that a jury considers the sum at which the goods were actually sold, as a fair measure of damages ^c. It has been doubted, however, whether, in an action of *trover* by the assignees of a bankrupt, for seizing goods of the bankrupt, the defendant may, without specially pleading them, give in evidence payments necessarily made by him out of the proceeds, in reduction of the damages ^d.

In action against sheriff, for taking insufficient pledges in replevin.

For wrongful or irregular distress.

In an action against the *sheriff*, for taking insufficient pledges in *replevin*, the sheriff is liable in damages to the extent of double the value of the goods distrained, but no further ^e. Where the defendant had wrongfully seized goods, and placed a man in possession of them for some days, the court of Common Pleas held that the owner might recover damages, although he had the use of the goods all the time ^f. But where a distress is sold without the previous appraisement directed by the 2 W. & M. sess. 1. c. 5. § 2. the party distrained on can only recover the value, *minus* the amount of rent due, though he may recover the special damage sustained by such illegal sale ^g.

In trespass and false imprisonment.

In an action of *trespass* and false imprisonment, brought against a private individual, for giving the plaintiff in charge to a constable,

^a Hargreaves v. Hutchinson, 4 Nev. & M. 11. 2 Ad. & E. 12. S. C.; and for the doctrine of *recouper*, see 4 Nev. & M. 13. (c.)

^b Quidley v. Edwick, 3 Leg. Obs. 75, 6.

^c Whitehouse v. Atkinson, 3 Car. & P. 344. 347. *per* Ld. Tenterden, Ch. J. Clark v. Nicholson, 6 Car. & P. 712. 1 Crompt. M. & R. 724. 1 Gale, 21. 5 Tyr. Rep. 233. 3 Dowl. Rep. 454. 9 Leg. Obs. 350. S. C.; and see Moon v. Raphael, 2 Bing. N. R. 310. 2 Scott, 489. 1 Hodges, 239. 7 Car. & P. 115. S. C.

^d Goldsmid v. Raphael, 3 Scott, 385.

^e Evans v. Brander, 2 H. Blac. 547. Yea v. Lethbridge, 4 Durnf. & E. 433. 2 H. Blac. 36. Hefford v. Alger, 1 Taunt.

218. Ward v. Henley, 1 Younge & J. 285. Paul v. Goodluck, 2 Bing. N. R. 220. 1 Hodges, 379. S. C. Hall v. Goodricke, 2 Scott, 363. S. C. Jeffery v. Bastard, 6 Nev. & M. 362. 2 Har. & W. 60. S. C.

^f Bayliss v. Fisher, (or Baylis v. Usher,) 7 Bing. 153. 4 Moore & P. 790. S. C.

^g Briggins v. Biggins v. Goode, 2 Tyr. Rep. 447. 2 Crompt. & J. 364. S. C.; and see Knotts (or Notts) v. Curtis, 5 Car. & P. 322. 2 Tyr. Rep. 449. (a.) S. C. Proudlove v. Twemlow, 1 Crompt. & M. 326. 3 Tyr. Rep. 260. S. C. Wells v. Moody, 7 Car. & P. 59. *per* Parke, B.; and as to the measure of damages, in an action for an excessive distress of growing

evidence of reasonable suspicion of the plaintiff's having been guilty of *felony*, is admissible on the plea of not guilty, in mitigation of damages^a. And where *A.* having been illegally arrested on *mesne* process, applied to the court to be discharged, and the rule was referred to a judge at chambers, who ordered him to be discharged, and would have given him the costs of the rule, if he would have undertaken to bring no action, but as he refused to give such undertaking, nothing was ordered as to the costs; it was holden, in an action of trespass and false imprisonment brought by *A.* for the arrest, first, that he was entitled to recover those costs as special damage, if properly laid in his declaration; and secondly, that as the declaration only alleged that he had been forced and obliged to pay, and had paid, &c. he could not recover the whole of the bill of costs of his attorney which he had not paid, though he was liable to pay them; but that he might recover so much of the bill of costs, as consisted of money actually paid by the attorney, which might be considered as money paid by him through his agent^b; and it seems that under an averment that he had been forced and obliged to, and had become liable, &c. he might have recovered damages for such liability^b. But in an action of *trespass* against the plaintiff's attorney, for taking goods under colour of a judgment which had been set aside for irregularity in practice without costs, the party on whose application the judgment had been set aside, cannot recover such costs as consequential damage^c.

In trespass to personal property.

In an action for *mesne* profits, the judgment in *ejectment* is conclusive evidence of the lessor of the plaintiff's right to the premises, from the day of the demise laid in the declaration in *ejectment*; but is no proof of the defendant's possession at that time. The consent rule, indeed, admits the possession at the time of the service of the declaration in *ejectment*; but if the plaintiff intend to go for *mesne* profits antecedent to that time, he must give distinct evidence of the defendant's possession^d. And where there is judgment by default in *ejectment*, the plaintiff may, in an action for *mesne* profits, recover all the expenses he has been necessarily put to in the *ejectment*, and is not limited to the taxed costs, as between party and

For mesne profits.

crops, see *Figgott v. Birtles*, 1 Meeson & W. 441. 1 Tyr. & G. 729. 2 Gale, 18. S. C.

^a *Chinn v. Morris*, Ry. & Mo. 424. 2 Car. & P. 361. S. C.; and see *Holtum v. Lotun*, 6 Car. & P. 726. *per Parks*, B.

^b *Pritchett v. Boery*, 1 Crompt. & M.

775. 3 Tyr. Rep. 949. S. C.

^c *Loton v. Devereux*, 3 Barn. & Ad. 343.

^d *Dodwell v. Gibbs*, 2 Car. & P. 619; but see *Doe v. Huddart*, 2 Crompt. M. & R. 316. 1 Gale, 260. 4 Dowl. Rep. 467. S. C.

In prohibition. party ^a. In a case however, where *A.* took possession of premises on the 2d of *June*, and a sum of money became due for ground rent on the 24th, for the quarter ending on that day, which *A.* paid, the court held, in an action for mesne profits against *A.*, that he was entitled to deduct the money so paid from the damages ^b. In *prohibition*, by a late statute ^c, "in case a verdict shall be given for the plaintiff, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but such assessment shall not be necessary to entitle the plaintiff to costs."

Of increasing, or reducing damages. The court will not in general increase the damages found by the jury ^d. And where, in an action for principal and interest on a mortgage deed, which was undefended, the plaintiff's counsel took a verdict for principal only, omitting to include the interest, the court refused to increase the amount of the verdict, by adding the interest ^e. So, where damages found by the jury have been calculated upon a value assented to by counsel on both sides, the court will not interfere, to reduce the amount of the verdict, on *affidavits* that counsel were mistaken in that which they assumed as the basis of their calculation ^f.

Judge's certificate respecting costs, and for immediate or speedy execution.

It will next be proper to consider the judge's certificate; and in what cases it is required, by the statute 43 Eliz. c. 6. and subsequent statutes, in order to deprive a party of costs to which he would otherwise be entitled, or to entitle him to costs of which he would otherwise be deprived, or to enable him to issue immediate or speedy execution.

Before, and by stat. 43 Eliz. c. 6.

Before the passing of the statute 43 Eliz. c. 6. a plaintiff was, by the provisions of the statute of *Gloucester* ^g, entitled to costs in every case in which he obtained a verdict, however small the damages might be, or trivial the injury sustained ^h. But to avoid trifling and frivolous suits in the superior courts of law at *Westminster*, it is enacted by the former of these statutes ⁱ, (extended to *Wales*, and the counties *palatine*, by the 11 & 12 W. III. c. 9. § 1,) that "if, upon any action personal to be brought in any of her majesty's courts at *Westminster*, not being for any title or interest of lands, nor concerning the free-

To deprive plaintiff of costs in personal actions, where the debt or damages are under 40s.

^a *Doe v. Huddart*, 2 Crompt. M. & R. 316. 1 Gale, 260. 4 Dowl. Rep. 437. 12 Leg. Obs. 29. S. C.

^b *Doe v. Hare*, 2 Crompt. & M. 145. 2 Dowl. Rep. 245. 4 Tyr. Rep. 29. 7 Leg. Obs. 284. S. C.; and see further, as to damages in actions for *wrongs*, Tidd *Prac.* 9 Ed. 871, &c.

^c 1 W. IV. c. 21. § 1.

^d *Cann v. Facey*, 5 Nev. & M. 405. 4 Ad. & E. 68. 1 Har. & W. 462. S. C.

^e *Baker v. Brown*, 5 Dowl. Rep. 318.

^f *Hilton v. Fowler*, *Id.* 312. and see Tidd *Prac.* 9 Ed. 896.

^g 6 Edw. I. c. 1.

^h *Wright v. Piggin*, 2 Younge & J. 548. *per Vaughan*, B.

ⁱ § 2.

"hold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, in the same court, shall not amount to the sum of *forty* shillings, that in every such case the judges and justices before whom such action shall be pursued, shall not award to the plaintiff any more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion." The intention of this statute was to confine trifling actions to inferior courts ^a: and a certificate may be granted upon it, at any time after the trial of the cause ^b.

Where the plaintiff, in an action against an attorney, recovers less than 40*s.* damages, the judge may certify, under the statute 43 Eliz. c. 6. so as to deprive the plaintiff of costs, although the defendant could only be sued in a superior court ^c. So where, in *trespass* against *A.* and *B.* the former pleads the general issue, which is found for him, and the latter suffers judgment by default, upon which one farthing damages are assessed, it is competent to the judge to certify under the above statute, to deprive the plaintiff of his costs ^d. And where, in *trespass quare clausum fregit* and for seizing goods, to which the defendant pleaded not guilty, and that the goods were not the property of the plaintiff, the jury found for the defendant on the last issue, and for the plaintiff on the first with 5*s.* damages, and the judge certified under the statute 43 Eliz. c. 6. the court held, that since the rule of H. 4 W. IV. ^e the case was not within the exception of that statute, nor out of the operation of the statute 22 & 23 Car. II. c. 9.; and that therefore the plaintiff was entitled to no more costs than damages ^f. But where, to a declaration in *trespass quare domum fregit*, with a count *de bonis asportatis*, the defendant pleaded the general issue and accord and satisfaction, the question at the trial being whether a term for years had expired, and the jury found a general verdict for the plaintiff with damages under 40*s.* and the judge certified the amount of the damages under the statute 43 Eliz. c. 6. the court of Exche-

Recent decisions thereon.

^a Gilb. Eq. Rep. 196. Gilb. C. P. 261, 2.

^b Say. Costs, 18. Holland v. Gore, 3 Durnf. & E. 38. (d.) Foxall v. Banks, 5 Barn. & Ald. 536.

^c Wright v. Nuttall, 10 Barn. & C. 492. 5 Man. & R. 454. S. C.; and see Seaton v. Benedict, 5 Bing. 187. 2 Moore & P. 301. S. C.; and for the earlier de-

cisions on this statute, see Tidd Prac. 9 Ed. 952, 3.

^d Harris v. Duncan, 4 Nev. & M. 63. 2 Ad. & E. 158. S. C.

^e R. Pl. H. 4 W. IV. *Trespass, reg. V.* § 2. *Ante*, 376.

^f Smith v. Edwards, 1 Har. & W. 497.

^g Dowl. Rep. 621. 11 Leg. Obs. 403, 4. S. C.

quer held that the plaintiff was entitled to costs *de incremento*, notwithstanding the certificate ^a. When the judge, having power to certify or not as he may think proper, certifies at the trial of an action of *trespass*, to deprive the plaintiff of costs, his certificate is holden to be final ^b. And the court will not set aside a certificate to deprive the plaintiff of costs, if the judge has power to certify, although the certificate may have been granted on an erroneous ground ^c. If there be a certificate upon this statute, the plaintiff is not entitled to the costs of any plea pleaded with leave of the court, although the issue thereupon joined be found for him, and the judge has not certified that the defendant had a probable cause for pleading the matter therein pleaded ^d. And where, to a declaration for a libel, the defendant pleaded the general issue and two special pleas, and at the trial the jury found all the issues for the plaintiff with 1*s.* damages, and the judge certified under the 43 Eliz. c. 6. the court held that the plaintiff was not entitled to the costs of the issues found for him, notwithstanding the rule of *Hil.* 4 W. IV. § 7 ^e. After a trial, the judge certified, under the statute of Elizabeth, to deprive a plaintiff of costs; and in the ensuing term, new facts, which did not appear at the trial, being laid before him on *affidavits*, an order was granted by the judge to annul the certificate ^f.

To entitle plaintiff to costs, on stat. 22 & 23 Car. II. c. 9. in actions of assault and battery, and for local trespasses, when the damages are under 40*s.*

Intention of this statute, and to what actions it is confined.

For the further prevention of trivial and vexatious suits in law, it was enacted by the statute 22 & 23 Car. II. c. 9. (extended to *Wales* and the counties *palatine*, by the 11 & 12 W. III. c. 9. § 1.) that "in all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40*s.* shall not recover or obtain more costs of suit than the damages so found shall amount unto." It seems to have been the intention of this statute, that the plaintiff should have no more costs than damages, in any personal action whatsoever, if the damages were under 40*s.* except in cases of battery or freehold; and not even in these, without a certificate: And this construction was adopted in

^a Wright v. Piggin, 2 Younge & J. 544.

^b Twigg v. Potts, 4 Dowl. Rep. 266.

^c Cann v. Facey, 5 Nev. & M. 405. 4 Ad. & E. 68. 1 Har. & W. 482. S. C.

^d Tidd Prac. 9 Ed. 659. 953, 4.

^e Simpson v. Hurdie, 2 Meeson & W. 84. 5 Dowl. Rep. 304. S. C.

^f Anderson v. Sherwin, 7 Car. & P. 527.

some of the first cases that arose upon the statute ^a: But a different construction soon prevailed; and it is now settled, that the statute is confined to actions of assault and battery, and for local trespasses, wherein it is possible for the judge to certify that the freehold or title of the land was chiefly in question ^b: Therefore, it does not extend to actions of *assumpsit*, debt, covenant, trover ^c, false imprisonment, or the like; or to actions for a mere assault ^d; or for criminal conversation ^e, or battery of the plaintiff's servant ^f, *per quod consortium, vel servitium, amisit*. And it has been holden that the statute only restrains the court from awarding more costs than damages; but the jury not being restrained thereby, may give what costs they please ^g.

The certificate required by this statute need not, it seems, be granted at the trial of the cause ^h; but may be granted within a reasonable time after the trial ⁱ: And where the defendant lets judgment go by default ^k, or justifies the assault and battery ^l, or pleads in such a manner as to bring the freehold or title of the land in question, on the face of the record ^m, a certificate is holden to be unnecessary. It should also be observed, that for the preventing of wilful and malicious trespasses, it is enacted by the statute 8 & 9 W. III. c. 11. § 4. that "in all actions of *trespass*, to be commenced or prosecuted in any " of his majesty's courts of record at *Westminster*, wherein at the trial " of the cause it shall appear, and be certified by the judge under " his hand, upon the back of the record, that the trespass upon which " any defendant shall be found guilty, was wilful and malicious, the " plaintiff shall recover not only his damages, but also his full costs of " suit; any former law to the contrary notwithstanding." ⁿ The certificate required by this statute need not be granted at the trial of the cause ^o; and if it appear on the trial that the trespass, however

Certificate thereon, at what time, and in what cases granted.

In actions for wilful and malicious trespasses, by stat. 8 & 9 W. III. c. 11. § 4.

^a *Mott v. Hamand*, 2 Keb. 849.
Pembroke v. Westall, 3 Keb. 121. *Claxton v. Lawes*, *id.* 247.

^b *Tidd Prac.* 9 Ed. 963. and the authorities there cited.

^c *Brown v. Taylor*, 3 Keb. 31. *Ven v. Phillips*, 1 Salk. 208.

^d *Page v. Creed*, 3 Durnf. & E. 391; and see *Brennan v. Redmond*, 1 Taunt. 16; but see *Smith v. Edge*, 6 Durnf. & E. 562.

^e *Batchelor v. Bigg*, 2 Blac. Rep. 854. 3 Wils. 319. S. C.

^f *Peak & ———*, 3 Keb. 184. *Ven v. Phillips*, 1 Salk. 208. *Anderson v. Buck-*

ton, 1 Str. 192.

^g *Watkinson v. Swyer*, Cas. Pr. C. P. 44. Pr. Reg. 112. S. C.

^h *Butler v. Cozens*, 11 Mod. 198.

ⁱ *Johnson v. Stanton*, 2 Barn. & C. 621. 4 Dowl. & R. 156. S. C.

^k *Bul. Ni. Pri.* 329.

^l *Smith v. Edge*, 6 Durnf. & E. 562.

^m *Littlewood v. Wilkinson*, 9 Price, 314; and for other decisions on this statute, see *Tidd Prac.* 9 Ed. 963, &c.

ⁿ For the exposition of this statute, see *Batchelor v. Bigg*, 3 Wils. 325.

^o *Swinerton v. Jarvis*, E. 23 Geo. III. C. P. 6 Durnf. & E. 12; and see *Tidd*

trifling, was committed after notice, and the jury give less than 40s. damages, it has been usual for the judge to consider himself bound to certify that the trespass was wilful and malicious, in order to entitle the plaintiff to his full costs^a.

In actions or prosecutions on revenue laws.

In actions or prosecutions on the *revenue* laws, it is enacted by the statute 28 Geo. III. c. 37^b. that "in case any information or suit shall be commenced and brought to trial, on account of the seizure of any goods, wares or merchandize, seized as forfeited by virtue of any act or acts of parliament relating to his Majesty's revenues of customs or excise, or of any ship, vessel or boat, or of any horse, cattle or carriage, used or employed in removing or carrying the same, wherein a verdict shall be found for the claimer thereof, and it shall appear to the judge or court before whom the same shall be tried or heard, that there was a probable cause of seizure, the judge or court shall certify that there was a probable cause for making such seizure; and in such case, the claimant shall not be entitled to any costs of suit whatsoever." And, by the acts for consolidating and amending the laws relative to *larceny*^c, &c. or *malicious* injuries to property^d, and the *metropolitan* police act^e, "in all actions for any thing done in pursuance of those acts, if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs, as between attorney and client, and have the like remedy for the same, as any defendant hath by law in other cases: And though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be, shall certify his approbation of the action, and of the verdict obtained thereupon."

In actions for things done in pursuance of acts relative to larceny, &c. and metropolitan police act.

Where one of several defendants is acquitted.

By the law amendment act^f it is enacted, that "where several persons shall be made defendants in any personal action, and any one or more of them shall, upon the trial of such action, have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless the judge, before whom

Prac. 9 Ed. 968, and the authorities there referred to.

^a *Reynold v. Edwards*, 6 Durnf. & E. 11; and see *Harper v. Carr*, 7 Durnf. & E. 449.

^b § 24. And there is a similar clause in the statutes 6 Geo. IV. c. 108. (for the prevention of smuggling,) § 92. and 7 & 8

Geo. IV. c. 53. (for consolidating the laws relating to the revenue of excise,) § 119.

^c 7 & 8 Geo. IV. c. 29. § 75.

^d *Id.* c. 30. § 41.

^e 10 Geo. IV. c. 44. § 41.

^f 3 & 4 W. IV. c. 42. § 32; and see stat. 8 & 9 W. III. c. 11. § 1. *Tidd Prac.* 9 Ed. 966. *Post*, Ch. XL. p. 553.

"the said cause shall be tried, shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action." And, by the statute 4 & 5 W. IV. c. 39.^a it is provided, that "in all actions of *quare impedit*, no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or, if there shall be no trial by a jury, the court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent, had probable cause for defending such action."

In *quare impedit*.

By the statute 7 Jac. 1. c. 5. it is enacted, that "if any action or suit upon the case, trespass, battery, or false imprisonment, shall be brought in any of his Majesty's courts at *Westminster*, or elsewhere, against any justice of the peace, mayor or bailiff of city or town corporate, headborough, portreeve, constable, &c. for or concerning any matter cause or thing by them or any of them done by virtue or reason of their or any of their office or offices, and the verdict shall pass with the defendant or defendants in any such action, or the plaintiff or plaintiffs therein become nonsuit, or suffer any discontinuance thereof, that in every such case the justices or justice, or such other judge before whom the said matter shall be tried, shall, by force and virtue of that act, allow unto the defendant or defendants his or their double costs, which he or they shall have sustained by reason of their wrongful vexation in defence of the said action or suit; for which the said defendants shall have the like remedy as in other cases, where costs by the law of this realm are given to the defendants." Upon this statute it has been holden, that to entitle a justice of the peace, or constable, &c. to double costs, after a verdict for him, it must in general be certified by the judge who tried the cause, that he was acting in the execution of his office^b. But where there is a special verdict, and it appears by the facts there found, that the act for which the action was brought, was done by the defendant by virtue or reason of his office, as a justice of the peace, &c. the master must tax double costs, though there has been no certificate, nor allowance by the judge who tried the cause^c. It is also provided by the statute 24 Geo. II. c. 44. § 7. that "where the plaintiff in any action against any justice of the peace, for any thing done by him in the execution of his office, shall obtain a verdict, in case the judge, before whom the cause shall be tried, shall in open court certify, on the back of the record, that the injury for which such

For double costs, in actions against justices, and constables, &c. by stat. 7 Jac. 1. c. 5.

Decisions thereon.

By stat. 24 Geo. II. c. 44. § 7.

^a *Post*, Ch. XL. p. 549, 50.

^c *Rann v. Pickins*, Doug. 308. n.

^b *Grindley v. Holloway*, Doug. 307.

"action was brought, was wilfully and maliciously committed, the plaintiff shall be entitled to have and receive double costs of suit."

In actions
against church-
wardens, and
overseers, &c.

The statute 7 Jac. I. c. 5. was extended to churchwardens and overseers of the poor, &c. by the statute 21 Jac. I. c. 12. § 3. And upon this statute it has been holden, that to entitle a churchwarden to double costs, there must be a certificate of the judge who tried the cause, that the defendant was such officer, and that the action was brought against him, for something done by him in the execution of his office^a. This certificate, however, need not be granted immediately after the trial of the cause^b. And where the plaintiff was nonsuited, it was holden that the judge before whom the cause was tried might, after an interval of *four* years, upon an *affidavit* that the defendant was within the provisions of 7 Jac. I. c. 5. grant a certificate, to entitle him to double costs^c.

For costs of
special jury.

We have already seen^d, that by the statute 6 Geo. IV. c. 50^e. "the person or party who shall apply for a special jury, shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same; and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto, in case the cause had been tried by a common jury; unless the judge, before whom the cause is tried, shall, immediately after verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury:" which provision was extended by the law amendment act^f, to cases in which the plaintiff is nonsuited, as well as to those in which there is a verdict against him. These statutes, however, do not seem to extend to a case where the record is withdrawn; but only where the cause has been tried^g. And where a case turned solely on a question of law, and there was no fact in dispute between the parties, the chief justice refused to certify for the costs of the special jury^h. An action for a *libel* in a newspaper would it seems be considered as a proper case to be tried by a special jury, if there were special pleas of justification; but not if the general issue only was pleadedⁱ.

^a Harper v. Carr, 7 Durnf. & E. 448.

^b *Id.* ib. Norman v. Danger, 3 Younge & J. 203.

^c Norman v. Danger, 3 Younge & J. 203. And see the statute 5 & 6 W. IV. c. 83. § 3. as to the judge's certificate for treble costs, in an action or suit for infringing, or *scire facias* to repeal letters patent.

^d *Ante*, 478, 9.

^e § 34; and see stat. 24 Geo. II. c. 18. § 1.

^f 3 & 4 W. IV. c. 42. § 35.

^g Clements v. George, 11 Moore, 510.

^h Wemyss v. Greenwood, 2 Car. & P. 483.

ⁱ Roberts v. Brown, 6 Car. & P. 757. *per* Tindal, Ch. J. And as to the judge's

By the speedy judgment and execution act ^a, it was enacted, that "in all actions brought in either of the superior courts of law at Westminster, by whatever form of process the same may be commenced, it shall be lawful for the judge before whom any issue joined in such action shall be to be tried, in case the plaintiff or defendant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify ^b under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification; and in case of a verdict for the plaintiff, then either for the whole, or for any part of the sum found by such verdict; in all which cases, a rule for judgment may be given ^c, costs taxed ^d, and judgment signed ^e forthwith, and execution ^f may be issued forthwith or afterwards, according to the terms of such certificate, on any day in vacation or term: and the *postea*, with such certificate as a part thereof, shall and may be entered of record ^g, as of the day on which the judgment shall be signed, although the writ of *distringas juratores*, or *habeas corpora juratorum*, may not be returnable until after such day: Provided always, that it shall be lawful for the party entitled to such judgment, to postpone the signing thereof."

For speedy judgment and execution.

On this statute it appears to have been decided, that certificates may be granted, to entitle the plaintiff to immediate execution, in actions of *assumpsit* on promissory notes ^h, &c. or in other actions, where there was no reasonable ground of defence, and the judge is of opinion, upon the facts proved at the trial, that execution

Decisions thereon.

certificate for costs on several counts, *vide ante*, 220; and on pleading several matters, by the statute 4 & 5 Ann. c. 16. § 4, 5. *ante*, 400, 401. and by the late statutory rule of H. 4 W. IV. reg. 7, *ante*, 405, 6. It should be observed, however, that the certificate required by the clause referred to in the statute of Ann seems to be rendered inoperative by the above rule. See also the directions to taxing officers, *Post*, Chap. XL. p. 562, 3. as to the certificate in case of a trial before a judge at *nisi prius*, when the sum recovered does not exceed 20*l.* that the cause was proper to be tried before him, and not before a sheriff, or judge of an inferior court.

^a 1 W. IV. c. 7. § 2.

^b Append. to Tidd *Sup.* 1833, p. 321.

^c As to the rule for judgment, see Tidd *Prac.* 9 Ed. 903. It should be remembered however, that, by a general rule of all the courts, (R. H. 2 W. IV. reg. 1. § 67. 8 Bing. 297, 8.) "after a verdict or nonsuit, judgment may be signed on the day after the appearance day of the return of the *distringas* or *habeas corpora*, without any rule for judgment."

^d As to taxing costs, and signing final judgment, see Tidd *Prac.* 9 Ed. 930.

^e As to the time of suing out execution in general, see Tidd *Prac.* 9 Ed. 994.

^f Append. to Tidd *Sup.* 1833, p. 321.

^g Bell v. Smith, 5 Car. & P. 10. *per Patteson, J.*

ought to be issued forthwith, or at a future day, before the return of the jury process: and the judge may certify for immediate execution, in an action of *assumpsit*, though the verdict be taken by consent, and the consent does not contain any such terms^a. It was not formerly usual for the judge to certify, in an action of *debt* on simple contract, where the defendant was obliged to plead and go to trial, or the plaintiff might have signed final judgment, without any writ of inquiry, on proof of the amount of his debt^b: And there has been some doubt amongst the judges, whether the statute was not intended to be confined to cases of *contract*^c: But it seems to be now settled, that the plaintiff is entitled to early execution, under the above statute, in actions of *debt*, as well as in other forms of action^d; and that it is not limited to cases of *contract*, but applies to all actions where the judge thinks there ought to be such execution^e: And accordingly, a certificate has been granted in an action for *mesne profits* and costs in *ejectment*^e: and, in an action for criminal conversation, where the plaintiff, to prevent a verdict passing against him in consequence of the prevarication of one of his witnesses, consented to be nonsuited, the judge who tried the cause directed execution to issue at the expiration of a month^e. Certificates have been also granted, in cases where the action was commenced before the passing of the act^f: but they are of course not grantable, where there was a reasonable ground of defence^g. And, in an action against an *executor*, on the bond of his testator, where a verdict is given for the plaintiff on the plea of *non est factum*, if the judge make an order for immediate execution, it will not entitle the plaintiff to issue execution in the first instance, against the goods of the defendant^h. *Affidavits*, it seems, are not in general admissible, in support of an application for immediate executionⁱ; but there may be cases in which justice may require them: and if a plaintiff obtain a verdict in an undefended cause, he ought to have execution for the amount, as soon as it can be obtained, accord-

^a Anon. 1 Moody & R. 167. *per Parke*, J.

^b Fisher v. Davies, 1 Moody & R. 98. *per* Ld. Tenterden, Ch. J. Ward v. Crocket, 5 Car. & P. 10. *per Parke*, J. Percival v. Alcock, 1 Moody & R. 167. *per Parke*, J.

^c Barden v. Cox, 1 Moody & R. 203. *per Patteson*, J.

^d Younge v. Crooks, *id.* 220. *per Parke*, J.

^e Hambidge v. Crawley, 5 Car. & P.

9. n. *per Tindal*, Ch. J.

^f Bell v. Smith, *id.* 10. *per Patteson*, J.

^g Barford v. Nelson, 5 Car. & P. 8. *per Patteson*, J. Wright v. Guiver, *id.* 9. n. *per* Ld. Lyndhurst, Ch. B. Crookshank v. Rose, *Id.* *ib.* 19, 20. *per* Ld. Tenterden, Ch. J.

^h Ward v. Thomas, 1 Comp. & M. 532. 2 Dowl. Rep. 87. 6 Leg. Obs. 156. S. C. Excheq.

ⁱ Gervas v. Burtchley, 1 Moody & R. 150. *per* Ld. Lyndhurst, Ch. B.

ing to the practice of the court ^a. But in *debt* on bond, to secure the payment by instalments of the consideration for the purchase of a business, the plaintiff ought to suggest breaches; and if he has not done so, and a verdict be found for him on the plea of *non est factum*, he is not entitled to a certificate for speedy execution under this statute ^b.

The *postea* is directed by the *schedule* annexed to the statutory rules of pleading ^c, to be in the usual form: And in the Common Pleas it was a rule ^d, that where final judgment was signed upon *posteas* or inquisitions upon writs of inquiry, such *posteas* or inquisitions should immediately be left with the clerk of the judgments, and should not afterwards be taken out of the office, without leave of the court. The clerk of the judgments however is authorized, by a late rule of that court ^e, to permit the *posteas* and inquisitions to be taken out of the office, for the purpose of being produced to the sealer of the writs, in order to obtain a writ of execution: but the attorney or agent who procures such *posteas* or inquisitions from the office of the clerk of the judgments, is required by the rule to cause the same to be returned again to the same officer, during the office hours of that day. And, by the late act for the more speedy judgment and execution, in actions brought in his majesty's courts of law at *Westminster* ^f, it is enacted, that "in all cases where the judge before whom the cause is tried, certifies under his hand, on the back of the record, that in his opinion execution ought to issue forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification, &c. the *postea*, with such certificate as a part thereof, shall and may be entered of record, as of the day of which the judgment shall be signed, although the writ of *dis-tringas juratores*, or *habeas corpora juratorum*, may not be returnable until after such day."

Postea, form of. When allowed, or not, to be taken out of office, in C. P.

To be entered on record, with judge's certificate for speedy execution.

^a Anon. 9 Leg. Obs. 174. *per Alderson*, B.; and see *Ruddick v. Simmons*, 1 Moody & R. 184. *per Bayley*, B.

^b *D'Aranda v. Houston*, 6 Car. & P. 511. *per Alderson*, B.

^c R. Pl. H. 4 W. IV. Sched. No. 2. 5 Barn. & Ad. Append. xi. 10 Bing. 473. 2 Crompt. & M. 26. Append. Post,

§ 9.

^d R. T. 13 Geo. II. reg. 2. C. P.; and see R. T. 29 Car. II. reg. V. C. P.

^e R. E. 2 W. IV. C. P. 1 Moore & S. 681. 8 Bing. 466; and see further, as to the *postea*, Tidd Prac. 9 Ed. 900.

^f 1 W. IV. c. 7. § 2.

CHAP. XXXVIII.

Of the RULE for JUDGMENT ; and MOVING for a NEW TRIAL, or in ARREST of JUDGMENT, &c.

Rule for judgment unnecessary, after verdict or nonsuit.

AFTER a general verdict, it was formerly incumbent on the prevailing party, in the King's Bench, to enter a rule for judgment *nisi causa*, on the *postea* or inquisition, with the clerk of the rules ; and a rule for judgment was necessary when a verdict was taken by consent, subject to the award of an arbitrator, as to the *quantum* of the demand ^a : but it was not necessary, if the plaintiff were *nonsuited* ; for in that case, as he was out of court, judgment might have been entered immediately after the day in bank ^b. In the Common Pleas, there was no rule for judgment ; but the prevailing party waited till after the appearance day, or *quarto die post* of the return of the *habeas corpora juratorum* ^c, before he signed final judgment, unless the *habeas corpora* were returnable on the *first* or *last* general return day : In the former case, final judgment could not have been signed, till the expiration of the first *four* days in full term : In the latter, it might it seems have been signed in the evening of the last day of term, being the appearance day of the return of the writ ^d. And now, by a general rule of all the courts ^e, " after a verdict or nonsuit, judgment may be signed on the day after the appearance day of the return of the *distringas*, or *habeas corpora*, without any rule for judgment."

Moving for new trial, &c.

Within the time limited by the above general rule, the plaintiff may move the court to set aside a verdict or nonsuit, and have a new trial ;

^a *Hayward v. Ribbans*, 4 East, 310.

^b R. E. 5 Geo. II. reg. III. (a.) K. B.

^c *Willis v. Bennett*, Barnes, 443. Pr.

Reg. 410. S. C. *Lyte v. Rivers*, Barnes, 445. *Reynolds v. Simonds*, *id.* 446. Pr. Reg. 410, 11. S. C.

^d *Thomas v. Ward*, 2 Bos. & P. 933 ; and see *Tidd Prac.* 9 Ed. 903, 4.

^e R. H. 2 W. IV. reg. I. § 67. 3 Barn. & Ad. 383. 8 Bing. 297, 8. 2 Crompt. & J. 186.

or for judgment *non obstante veredicto*: or the court may order a verdict to be entered for the plaintiff, where the judge directed a nonsuit in an undefended cause, with liberty for the plaintiff to move to enter a verdict^a: And the defendant may move to set aside a verdict, and have a new trial; or, after a point reserved, that a nonsuit may be entered; or he may move in arrest of judgment: And either party may move for a repleader, or *venire facias de novo*^b.

By the late act for the more speedy judgment and execution in actions brought in his majesty's courts of law at *Westminster*^c, it is provided, that "notwithstanding any judgment signed or recorded, or execution issued, by virtue of that act, it shall be lawful for the court in which the action shall have been brought, to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment, or grant a new trial, as justice may appear to require; and thereupon the party affected by such writ of execution, shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error or otherwise, as the court may think fit to direct." The provisions of this statute being extended to proceedings before the sheriff, under the 3 & 4 W. IV. c. 42. § 17. the court will, in the next term, entertain a motion to vacate and arrest a judgment upon the latter statute, signed in vacation^d. And it has been decided, that when a judge at the assizes orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying in the next term, to the court above, to enter a suggestion, to deprive the plaintiff of his costs, on a court of requests act^e: A judge, at the assizes, has no power to order such a suggestion to be entered^f.

Vacating judgment, and staying or setting aside execution, &c. or granting new trial.

By the late act for improving the practice and proceedings in the court of Common Pleas in the county palatine of *Lancaster*^g, "it shall be lawful for any party, in any action now depending or hereafter to be depending in the said court of Common Pleas at *Lancaster*, to apply by motion to any one of the superior courts at *Westminster* sitting *in banco*, within such period of time after the trial as motions of the like kind shall from time to time be permitted to be

Rules for new trials, in causes tried in C. P. at *Lancaster*, may be moved before any of the courts at *Westminster*.

^a Treacher v. Hinton, 4 Barn. & Ald. 413.

^b Tidd Prac. 9 Ed. 904.

^c 1 W. IV. c. 7. § 4. *Ante*, 295.

^d Pyke v. Glendinning, 2 Dowl. Rep. 611. *per Patterson, J.*

^e Baddeley v. Oliver, 1 Crompt. & M. 219. 3 Tyr. Rep. 145. 1 Dowl. Rep. 598. S. C.; and see Tidd Prac. 9 Ed. 961.

^f 4 & 5 W. IV. c. 62. § 26.

“made in the said superior court, for a rule to shew cause why a new trial should not be granted, or nonsuit set aside and a new trial had, or a verdict entered for the plaintiff or defendant, or a nonsuit entered, as the case may be, in such action, (which court is thereby authorized and empowered to grant or refuse such rule,) and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon, as the same court shall think proper; and in case such court shall order a new trial to be had in any such action, the party or parties obtaining such order shall deliver the same, or an office copy thereof, to the prothonotary of the said court of Common Pleas at *Lancaster*, or his deputy; and thereupon all proceedings upon the former verdict or nonsuit shall cease; and the action shall proceed to trial at the next or some other subsequent session of assizes, holden for the county of *Lancaster*, in like manner as if no trial had been had therein; or in case the court before which any such rule shall be heard, shall order the same to be discharged, the party or parties obtaining any such order may, upon delivering the same, or an office copy thereof, to the said prothonotary or his deputy, be at liberty to proceed in any such action, as if no such rule *nisi* had been obtained; or if a verdict be ordered to be entered for the plaintiff or defendant, or a nonsuit be ordered to be entered, as the case may be, judgment shall be entered accordingly.

Judgment and execution not to be stayed, unless the party moving enters into recognizance with sureties.

“Provided always, that the entering up of judgment in any action in the said court of Common Pleas at *Lancaster*, and the issuing of execution upon such judgment, shall not be stayed, unless the party intending to apply for such rule as last aforesaid shall, with two sufficient sureties, such as the last mentioned court shall approve of, become bound unto the party for whom such verdict or nonsuit shall have been given or obtained, by recognizance to be acknowledged in the same court, in such reasonable sum as the same court shall think fit, to make and prosecute such application as aforesaid, and also to satisfy and pay, if such application shall be refused, the debt or damages and costs adjudged, and to be adjudged, in consequence of the said verdict or nonsuit, and all costs and damages to be awarded for the delaying of execution thereon^a.

Not to take away power of court of C. P. at *Lancaster*, to grant a new trial.

“Provided also, that nothing therein contained shall prevent the said court of Common Pleas at *Lancaster* from granting any new trial, or setting aside any nonsuit, or entering a nonsuit, or altering a verdict, as heretofore.”^b On this act it has been determined, that

^a § 27.

^b § 28.

a motion for a new trial, in an action brought in the Common Pleas at *Lancaster*, must be made in the court in which the judge sits who presided at the trial ^a: but this act does not authorize the court above to entertain a motion in a cause in the Common Pleas at *Lancaster*, to set aside an award made under an order of *nisi prius*, though a verdict was taken subject to the award ^b. And the court above has no power to order judgment to be entered up *non obstante veredicto*, in an action brought in the Common Pleas at *Lancaster* ^c.

Decisions
thereon.

It may not be improper to notice in this place some recent decisions, as to granting new trials in trifling actions. When the sum to be recovered is under 20*l.* the action is considered as trifling, so as to prevent the court from granting a new trial, after verdict for the *plaintiff*, unless the judge has misdirected the jury, or has received or rejected evidence improperly ^d: and it seems that the same rule applies, where the sum in dispute is under 20*l.* after verdict for the *defendant* ^e. The principle of the rule is, that if there be no misdirection, the party would have to pay costs; which would not be worth his while, in cases where the verdict is for less than 20*l.* ^f: And where the jury have incorrectly, and contrary to the judge's directions, found for the defendant, the court will not grant a new trial, to enable the plaintiff to recover *nominal* damages only ^g. Where the precise sum of 20*l.* is recovered, the court, on proper grounds, will grant a new trial ^h. And a new trial has been granted, in *trespass* for cutting down trees, though the damages are under 20*l.*, where the object of the action was to try a right of a permanent nature ⁱ. So, where the verdict is perverse, the court of Exchequer will grant a new trial, although the damages given for the plaintiff are less than 20*l.* ^k. And the rule which forbids a motion for a new trial, where the amount is under 20*l.* except for misdirection of the judge, does not, we have

In trifling ac-
tions.

^a *Foster v. Jolly*, 1 *Crompt. M. & R.* 703. 5 *Tyr. Rep.* 239. *Foster v. Jolliffe*, 1 *Scott*, 54. *S. C.*

^b *Byrne v. Fitzhugh*, 1 *Crompt. M. & R.* 597. 5 *Tyr. Rep.* 221. 3 *Dowl. Rep.* 289. *S. C.*

^c *Potter v. Moss*, 1 *Crompt. M. & R.* 848. 3 *Dowl. Rep.* 432. 9 *Leg. Obs.* 333. *S. C.*

^d *Tidd Prac.* 9 *Ed.* 910. (*h.*)

^e *Green v. Speakman*, 8 *Moore*, 339. *Scott v. Watkinson*, 4 *Moore & P.* 237. *Young v. Harris*, 1 *Price, N. R.* 136. 2

Crompt. & J. 14. 2 *Tyr. Rep.* 167. 1 *Leg. Ex.* 30. *S. C.* *Haine v. Davey*, 6 *Nev. & M.* 356. 2 *Har. & W.* 30. *S. C.*

^f ——— *v. Phillips*, 1 *Crompt. & M.* 26.

^g *Harris v. Jones*, 1 *Moody & R.* 173. *per Tindal*, *Ch. J.*

^h *Dyball v. Duffield*, *M.* 59 *Geo. III.* *K. B.* 1 *Chit. Rep.* 265. (*a.*)

ⁱ *Turner v. Lewis*, 1 *Chit. Rep.* 265.

^k *Freeman v. Price*, 1 *Young & J.* 402.

seen^a, apply to trials before the sheriff, under the statute 3 & 4 W. IV. c. 42^b.

Motion for,
when made, in
K. B.

In the King's Bench, it had become the practice for counsel, at the close of the *fourth* day of each term, to insert in a list the names of those cases in which they were instructed to move; which cases they were called upon to move on the following days, in the order of their precedence: and it seems that in *Easter* and *Michaelmas* terms, in which, on account of the circuits, the number of motions is usually large, the court will still allow that course to be pursued^c. But in *Hilary* term 1828, Lord *Tenterden*, Ch. J. said that the court wished it to be understood, that for the future, in *Hilary* and *Trinity* terms, the court would not hear any motion for a new trial, unless such motion were actually made within the first *four* days of the term; and that even if counsel were instructed within the first *four* days, and there should not be time to hear them on the fourth day, the court would not hear them afterwards; and in such cases the parties could only blame themselves for not instructing their counsel sufficiently early^d. So, in the Common Pleas, it is a rule^e, that "in *Hilary* and *Trinity* terms, no motion for a new trial shall be heard, unless such motion be actually made within the first *four* days of each of the said terms." And in general, the motion for a new trial must be made in that court, within the first *four* days of the term, if the cause be tried in vacation; and cannot be received after the *four* days, unless where the foundation of the motion is a fact not disclosed to the party till after that time^f. In the Exchequer also it is a rule, that motions for new trials must be made within the first *four* days of term^g: and this rule appears, in several recent instances, to have been strictly adhered to^h. But in that court, as in the King's Bench, where a cause is tried at the sittings in term, a motion may be made for a new trial, at any time within *four* days after the return of the *distringas*, although more than *four* days have elapsed since the trialⁱ. And the court will allow further time to make a motion for a new

In C. P.

In Exchequer.

^a *Ante*, 471.

^b *Taylor v. Helps*, 5 Barn. & Ad. 1068. *Edwards v. Dignam*, 2 Dowl. Rep. 642.; but see *Henning v. Samuel*, 3 Moore & S. 818. 2 Dowl. Rep. 766. S. C. *semb. contra*.

^c 3 Car. & P. 111. (a.)

^d *Id.* 111.

^e R. E. 11 Geo. IV. C. P. 6 Bing.

622. 4 Moore & P. 444; and see *Tidd Prac.* 9 Ed. 912, 13.

^f *Willis v. Bennett*, Barnes, 443. *Reynolds v. Simonds*, *id.* 446. Fr. Reg. 410, 11. S. C.

^g 3 Leg. Obs. 43.

^h *Mason v. Clarke*, 1 Crompt. & J. 411. 1 Tyr. Rep. 534. 1 Dowl. Rep. 288. S. C.

trial, if the undersheriff do not furnish his notes of the trial in proper time^a. Where a rule for a new trial had been moved for by mistake in a wrong court, and the mistake was not discovered till after the first *four* days of the term had elapsed, the court of Exchequer, under the circumstances, allowed the motion to stand good as of the latter court^b.

When the rule for a new trial was silent as to costs, the costs of the first trial were not in general allowed in the court of King's Bench, whichever way the verdict might go upon the second trial^c. In the Common Pleas, the rule was formerly different; for there, if a new trial were granted, and the rule said nothing about costs, if the verdict on the second trial went the same way, the party succeeding was entitled to the costs of both trials^d, and also, it seems, to the costs of the application^e; but if the verdict went different ways, the party ultimately succeeding was not entitled to the costs of the first trial^d. In the Exchequer, there was a similar distinction^f. But, by a general rule of all the courts^g, "if a new trial be granted, without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second." This rule, however, is not retrospective: therefore, a party, who before the rule had succeeded on two trials, was holden to be still entitled to the costs of both, and to the costs of entering up judgment *nunc pro tunc*, where the delay had not been occasioned by himself^h. And the rule applies only to cases where a new trial is granted upon the whole record^h: Therefore where, on the trial of a right of way, in one count claimed as a public, and in another as a private way, a general verdict was found for the defendants, and the court afterwards directed a new trial, expressly by the rule confining it to the right claimed in the second count, but in the rule no mention was made of costs, nor any reservation of the defendant's verdict on the first count, the court held that the defendants were nevertheless enti-

Costs of first trial, when rule is silent respecting them.

^a Thomas v. Edwards, 2 Dowl. Rep. 664. 4 Tyr. Rep. 835. 1 Crompt. M. & R. 362. S. C. *per Parke*, B.

^b Figgott v. Kemp, 2 Dowl. Rep. 20. 6 Leg. Obs. 362. S. C.

^c Tidd *Prac.* 9 Ed. 916. (c.)

^d *Id.* (L)

^e Truslove v. Burton, 10 Moore, 96.

^f Loader v. Thomas, 1 Crompt. & J. 54. 3 Younge & J. 525. S. C.; and see Stuart v. Greenall, 13 Price, 755. Pooley v. Millard, 1 Tyr. Rep. 260. Harrison v.

Bennett, 1 Crompt. & M. 203. 2 Tyr. Rep. 740. 1 Dowl. Rep. 627. S. C. Dax Ex. Pr. 149; but see Scally v. Powis, 1 Har. & W. 118. 3 Dowl. Rep. 372. S. C.

^g R. H. 2 W. IV. reg. I. § 64. 3 Bagn. & Ad. 382. 8 Bing. 297. 2 Crompt. & J. 185, 6; and see Newberry v. Colvin, 2 Dowl. Rep. 415. 7 Leg. Obs. 252. S. C. *per Littledale*, J.

^h Carlisle v. Garland, 9 Bing. 85. 2 Moore & S. 180. S. C.

tled to the costs of the issues found for them on the first trial, and not in contest on the second, they having succeeded on such second trial^a.

Time for moving
in arrest of
judgment, or for
judgment *non*
obstante vere-
dicto.

The motion in arrest of judgment, or for judgment *non obstante veredicto*, might it seems formerly have been made, in the King's Bench, at any time before judgment was given^b, though a new trial had been previously moved for^c. In the Common Pleas, the motion in arrest of judgment must have been made before or on the appearance day of the return of the *habeas corpora juratorum*^d. In the Exchequer, the motion in arrest of judgment must it seems have been made within the first *four* days of the next term after the trial; and it could not have been made after an unsuccessful motion for a new trial^e. And now, by a general rule of all the courts^f, "no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed, after the expiration of *four* days from the time of trial, if there are so many days in term; nor in any case after the expiration of the term, provided the jury process be returnable in the same term." Since the making of this rule, a motion in arrest of judgment, on a cause tried out of term, must be made within the first *four* days of the term ensuing the trial^g.

Costs, on arrest-
ing judgment.

When judgment is arrested, each party pays his own costs^h. But where the plaintiff obtained a verdict in the court of Exchequer, wherein judgment was arrested, which judgment was reversed by the court of Exchequer chamber, it was holden that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the court of Exchequerⁱ.

^a *Bower v. Hill*, 2 Scott, 535. 540. 5 Dowl. Rep. 183. S. C.; but see *Peacock v. Harris*, 1 Nev. & P. 240.

^b *Rex v. Hayes*, 2 Str. 845. *Rex v. Robinson*, 2 Ken. 467. *Rex v. Holt*, 5 Durnf. & E. 445.

^c *Taylor v. Whitehead*, Doug. 745, 6; but see *Weston v. Foster*, 2 Bing. N. R. 701. 3 Scott, 164. 5 Dowl. Rep. 54. S. C.

^d *Lyte v. Rivers*, Barnes, 445.

^e *Lane v. Crockett*, 7 Prie, 566; but see *Man. Ex. Pr.* 363.

^f R. H. 2 W. IV. reg. I. § 65. 3 Barn. & Ad. 383. 8 Bing. 297. 2 Crompt. & J. 186.

^g *Weston v. Foster*, 2 Bing. N. R. 701. 3 Scott, 164. 5 Dowl. Rep. 54. 12 Leg. Obs. 310, 11. S. C.

^h *Gilb. C. P.* 272. *Tiffin v. Glass*, Barnes, 143. *Fisher v. Kitchingman*, *Id.* 284. *Hul. Costs*, 1 Ed. 129; and see *Tidd Prac.* 9 Ed. 929.

ⁱ *Adams v. Meredew*, 3 Younge & J. 419. *Dax Ex. Pr.* 149, 50. S. C. cited.

CHAP. XXXIX.

Of JUDGMENTS.

AT common law, the jury process being returnable only in *term* time, the final judgment, after verdict or nonsuit, could not have been signed in vacation^a. This practice being attended with great inconvenience, was altered by the statute 1 W. IV. c. 7.^b by which, we have seen^c, that “in all cases where the judge before whom the issue is tried shall, in case the plaintiff shall become nonsuit, or a verdict shall be given for the plaintiff or defendant, *certify*^d under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict, a rule for judgment may be given^e, costs taxed, and judgment signed forthwith, and execution may be issued forthwith or afterwards, according to the terms of such certificate, on any day in vacation or term: Provided always, that it shall be lawful for the party entitled to such judgment, to postpone the signing thereof.”

By the above statute^f, “every judgment, to be signed by virtue of that act, may be entered and recorded as the judgment of the court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof^g; and every execution issued by virtue of that act, shall and may bear *teste* on the day of issuing thereof^h; and such judgment and execution shall be as

Final judgment after verdict or nonsuit, when and how signed, at common law. By stat. 1 W. IV. c. 7.

Entering and recording judgment.

^a Tidd *Prac.* 9 Ed. 980.

^b § 2.

^c *Ante*, 535.

^d For the form of the certificate, see *Append. to Tidd Sup.* 1833. p. 321.

^e As to the rule for judgment, see Tidd *Prac.* 9 Ed. 903. *Ante*, 294, b. 538.

^f Stat. 1 W. IV. c. 7. § 3.

^g As to the entry of judgments, see Tidd *Prac.* 9 Ed. 931, 2.

^h And see stat. 3 & 4 W. IV. c. 67. § 2, by which *all* writs of execution may be *tested* on the day on which the same are issued, and be made *returnable* immediately after execution thereof. *Post*, 567.

Decisions there-
on.

" valid and effectual, as if the same had been signed, and recorded, " and issued, according to the course of the common law." Before the passing of this act, the allegation of a judgment signed out of term would have been erroneous on the face of it; but now, the court will take notice that a judgment may be signed in vacation, under the statute ^a. And it has been determined, that in declaring on a judgment signed in vacation, on certificate by the judge at *nisi prius* for immediate execution under the above statute, the day of signing judgment should be stated according to the fact, and not laid as of the preceding term ^b: but it is enough to set out the judgment as it appears upon the record, and the certificate need not be stated ^b. The *postea* however, in such a case, should be so framed that the judgment may appear to be warranted by the previous finding of the jury ^b. But where, on *nul tiel record* pleaded to *debt* on recognizance of bail, the *postea* shewn to the court proved erroneous in this respect, leave was given to amend it; the defendants also having leave to plead *de novo* ^b.

Entry of judgment after verdict, or nonsuit.

The entry of final judgment, after verdict or nonsuit, begins with a copy of the issue, to the end of the award of the *venire facias*; after which it proceeds with the *jurata*, as in the record of *nisi prius*: It then states the return of that record by the chief justice, or justices of assize, with the *postea* indorsed thereon, and concludes with the judgment of the court, whether it be for the plaintiff on a verdict, or for the defendant on a verdict or nonsuit. The form of a judgment for the plaintiff in *assumpsit* is given in the schedule annexed to the late statutory rules ^c, and may be readily applied to the judgment in other actions ^d.

Form of, in *assumpsit*, &c.

Against heirs.

The judgment against an *heir*, on the bond of his ancestor, is *general* or *special* ^e: In *debt* against an heir, who pleaded *riens per discent*, or any other plea which was false within his own knowledge, and found against him, the judgment at common law was *general*, to recover the debt, and not *special*, to be levied of the lands descended ^f. So, if judgment be given against an heir by *nihil dicit*, or

^a *Engleheart v. Eyre*, 5 Barn. & Ad. 70. per *Parker, J.*

^b *Same v. Same*, 5 Barn. & Ad. 68. 2 Nev. & M. 849. S. C.

^c R. P. L. H. 4 W. IV. Sched. No. 3. 5 Barn. & Ad. Append. xi, xii. 10 Bing. 478. 2 Cromp. & M. 26, 7. Append. Post, § 11.

^d As to the entry of judgment after

verdict, &c. see *Tidd Prac.* 9 Ed. 931. And for the forms of judgments after verdict or nonsuit, &c. see *Tidd Prac. Forms*, 332, &c.

^e 2 Rol. Abr. 70, 71. C.; and see *Vin. Abr. tit. Heir*, C. Bac. Abr. tit. *Heir and Ancestor*, H. 2 Wms. Saund. 5 Ed. 7. (4.)

^f *Anon. Dyer*, 140. a. Bro. Abr. tit. *Assets per discent*, pl. 13.

non sum informatus^a, or by confession, without shewing in certain what assets he has by descent^b, the judgment is general: and if the profits of the land descended, from the death of the ancestor to the time of bringing the action, are sufficient to satisfy the demand, and the plaintiff will shew it to the court in an action of *debt* against an heir, and the defendant cannot deny it, the plaintiff shall have a general judgment, and execution presently^c. But in an action of *debt* against an heir, if he acknowledge the action, and shew the certainty of the assets which he has by descent, the judgment shall be special, to recover the debt, to be levied of the lands descended^d: and if the defendant plead *non est factum*, or any other plea which is not false within his own knowledge, there shall be a like judgment^e. In *debt* against an heir, on the bond of his ancestor, the defendant pleaded *riens per discent* before, at, or since the exhibiting of the bill, and the plaintiff replied that before the commencement of the suit, the defendant had lands by descent, and obtained a verdict, but the jury did not inquire of the value of the lands descended; and the court held that the replication provided by the statute 3 W. & M. c. 14. § 6. having been adopted, the jury who tried the cause should have inquired the value of the lands descended, and a *venire de novo* was awarded^f. In this case, however, it was not decided, whether the above statute is general in its operation, or confined to cases of alienation before action brought; nor whether that statute continues to a plaintiff his common law right to a general judgment, on a false plea of *riens per discent* pleaded^g.

The judgment, at common law, had relation to the first day of the term whereof it was entered^h, unless any thing appeared on the record shewing that it could not have that relationⁱ: and, as against the defendant and his heirs, it bound a moiety of all the freehold lands and

Relation and effect of judgment, at common law.

^a Henningham's case, Dyer, 344. a. b. Plowd. 440. Barker v. Bourn, Cro. Eliz. 692.

^b *Id. ibid.*; but see Anon. Dyer, 149. a.

^c Henningham's case, Dyer, 344. b.

^d 2 Rol. Abr. 70. C. pl. 1. Anon. Dyer, 149. a. Anon. *id.* 373. b.

^e Clothworthy v. Clothworthy, Cro. Car. 436, 7. Append. to Tidd *Prac.* 9 Ed. Ch. XXXIX. § 18.

^f Brown v. Shuker, 1 Price, N. R. 1. 1 Tyr. Rep. 400. 1 Crompt. & J. 583. S. C. Same v. Same, 2 Crompt. & J. 311. 2

Tyr. Rep. 320. S. C.; and see Minshall v. Evans, 1 Price, N. R. 7. And as to the liability of heirs and devisees upon judgments, and the proceeding in equity for facilitating the payment of debts, whether due on simple contract or specialty, out of real estate, see stat. 3 W. & M. c. 14. § 6. 11 Geo. IV. & 1 W. IV. c. 47. § 7; and 3 & 4 W. IV. c. 104.

^g Tidd *Prac.* 9 Ed. 935. (b.)

^h Swan v. Broome, 3 Bur. 1596; and see Lyttleton v. Cross, 3 Barn. & C. 317. 5 Dowl. & R. 175. S. C.

tenements^a, which he, or any person or persons in *trust* for him^b, was or were seised of, at or after the time to which the judgment related.

Taken away, as
against pur-
chasers, by
statute of frauds.

The relation of judgments at common law, to the first day of the term, is taken away, as against purchasers, by the statute of frauds and perjuries^c; by which it is enacted, that "the judge or officer who shall sign any judgments, shall, at the signing of the same, set down "the day of the month and year of his so doing, upon the paper "book, docket or record which he shall sign; which day of the month "and year shall be also entered upon the *margent* of the roll of the "record where the said judgment shall be entered^d: and such judgments, as against purchasers *bond fide* for valuable considerations, "of lands, tenements, or hereditaments to be charged thereby, shall, "in consideration of law, be judgments only from such time as they "shall be so signed, and shall not relate to the *first* day of the term "whereof they are entered, or the day of the return of the original, "or filing the bail." And, by a late statutory rule^e, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed; and shall not have relation to any other day: Provided, that it shall be competent for the court, or a judge, to order a judgment to be entered *nunc pro tunc*."^f

By statutory
rule.

Judgment *nunc
pro tunc*.

^a Stat. *Westm.* II. (13 Edw. I.) c. 18.

^b Stat. 29 Car. II. c. 3. § 10.

^c *Id.* § 14, 15; and see Tidd *Prac.* 9 Ed. 938.

^d See R. T. 29 Car. II. reg. V. C. P. for the better observation of this statute.

^e R. Pl. Gen. H. 4 W. IV. reg. 3. 5

Barn. & Ad. Append. ii. 10 Bing. 464. 2 Cromp. & M. 11.

^f As to the judgment *nunc pro tunc*, see Tidd *Prac.* 9 Ed. 932, 3.

CHAP. XL.

Of Costs.

IN the present Chapter it is intended to consider, 1st, the costs in *quare impedit*; 2dly, the costs in actions or suits, for infringement or repeal of letters patent; 3dly, the costs in actions by executors and administrators; 4thly, the costs when one of several defendants is acquitted; 5thly, the costs of several counts, pleas, or issues; 6thly, the costs on demurrer; and lastly, the taxation of costs.

When *single* damages are given by a statute, subsequent to the statute of *Gloucester*^a, in a new case, wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are not mentioned in the statute. The rule in *Pilfold's* case^b is, that he shall not; and accordingly it was holden, that the plaintiff was not entitled to costs in *quare impedit*, wherein damages were given by the statute *Westm.* II. (13 Edw. I.) c. 5. § 3^c. But it having been found that the delay and expense of recovering advowsons, and the rights of patronage and presentation to ecclesiastical benefices, by actions of *quare impedit*, were much increased, by reason of the defendants in such actions not being liable for the payment of costs, and the true patrons were thereby frequently deterred from the prosecution of their just rights; and it being deemed expedient to afford further protection to incumbents of advowsons, from vexatious and unfounded proceedings to disturb them in the enjoyment thereof^d, it is enacted by the statute 4 & 5 W. IV. c. 39. intituled 'An act to give costs in *quare impedit*,' that "in all writs and "actions of *quare impedit*, issued or brought from and after the passing of that act, in *England, Wales, or Ireland*, where a verdict shall "pass or be given for the plaintiff or plaintiffs in any such writ or "action, the plaintiff or plaintiffs in every such writ or action, in addition to the damages to which he or they is or are by law now en-

In *quare impedit*.

^a 6 Edw. I. c. 1. § 2.

^b 10 Co. 116. a.

^c Tidd *Prac.* 9 Ed. 946.

^d Preamble to stat. 4 & 5 W. IV. c. 39.

If plaintiff be nonsuited, &c., defendant have costs.	<p>“ titled, shall also have judgment to recover his or their full costs and charges against the defendant or defendants therein, to be assessed, taxed and levied, in such manner and form as costs in <i>personal</i> actions are now by law assessed, taxed, and levied : And where, in any such writ or action, the plaintiff or plaintiffs therein shall discontinue, or be nonsuited, or a verdict shall be had against him or them, that then the defendant or defendants in every such writ or action shall have judgment to recover his or their full costs and charges against the plaintiff or plaintiffs therein, to be assessed, taxed and levied in manner aforesaid : Provided always, that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or if there shall be no trial by a jury, the court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron or incumbent, had probable cause for defending such action ; but in no case, when the defence to any such action shall be grounded upon a presentation or presentations, collation or collations, previously made to any benefice, shall such presentation or presentations, collation or collations, be deemed or considered probable cause for defending such action.”</p>
Exception.	<p>By the statute 5 & 6 W. IV. c. 83. § 3. it is enacted, that “ if any action at law, or any suit in equity, for an account shall be brought in respect of any alleged infringement of letters patent for inventions theretofore or thereafter granted, or any <i>scire facias</i> to repeal such letters patent, and if a verdict shall pass for the patentee or his assigns, or if a final decree or decretal order shall be made for him or them upon the merits of the suit, it shall be lawful for the judge before whom such action shall be tried, to certify on the record, or the judge who shall make such decree or order, to give a certificate under his hand, that the validity of the patent came in question before him ; which record or certificate, being given in evidence in any other suit or action whatever touching such patent, if a verdict shall pass, or decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive <i>treble</i> costs in such suit or action, to be taxed at three times the taxed costs, unless the judge making such second or other decree or order, or trying such second or other action, shall certify that he ought not to have such treble costs.” And it is thereby further enacted, that “ in any action brought for infringing the right granted by any letters patent, in taxing the costs thereof, regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the judge before whom the same shall be had ; and the</p>
Costs in action or suit for infringement, or repeal of letters patent.	

"costs of each part of the case shall be given, according as either party has succeeded or failed therein, regard being had to the notice of objections thereinbefore mentioned, as well as the counts in the declaration, and without regard to the general result of the trial."

Executors and administrators not being particularly excepted out of the statute 23 Hen. VIII. c. 15. it was formerly holden that they were not liable to costs, when plaintiffs, upon a nonsuit^a or verdict^a, where they necessarily sued in their representative character, and could not bring the action in their own right; as upon a *contract* entered into with the testator or intestate^a, or for a *wrong* done in his life time^a: though, where the cause of action arose after the death of the testator or intestate, and the plaintiff might sue thereon in his own right, he was not excused from payment of costs, if he brought the action as executor or administrator; as upon a *contract*^b, express or implied, or in *trover* for a conversion after the death of the testator or intestate^b. But now, by the law amendment act^c, it is enacted, that "in every action brought by any executor or administrator, in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the superior courts of law at *Westminster* shall otherwise order, be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." Under this statute, executors are it seems liable to costs, in actions commenced before it came into operation, and not tried till afterwards^d: and where the action had been commenced before the act came into operation, but the writ and declaration were amended after it had taken effect, the plaintiffs were held liable to all costs incurred after the amendment^e. So, an execu-

In actions by executors or administrators, on nonsuit or verdict against them.

By law amendment act.

Decisions thereon.

^a See the cases referred to in Tidd *Prac.* 9 Ed. 978.

^b *Id. ib.*; and see *Dowbiggin v. Harrison*, 9 Barn. & C. 666. 4 Man. & R. 622. 8. C. Tomlinson v. Nanny, 6 Leg. Obs. 157, 8. Excheq. *Jobson v. Forster*, 1 Barn. & Ad. 6. *Slater v. Lawson*, *id.* 893.

^c 3 & 4 W. IV. c. 42. § 31; and see 3 Rep. C. L. Com. 61. 86: And for the cases in which executors and administra-

tors were or were not liable to costs, when plaintiffs, before the 3 & 4 W. IV. c. 42. see Tidd *Prac.* 9 Ed. 978, 9.

^d *Freeman v. Moyes*, 1 Ad. & E. 538. 3 Nev. & M. 863. 8. C. *Littledale, J. dissentiente*. *Grant v. Kemp*, 2 Crompt. & M. 636.

^e *Lakin v. Massie*, 4 Dowl. Rep. 239. 1 Gale, 270. 11 Leg. Obs. 119. 8. C.; and see *Prole v. Wiggins*, 3 Bing. N. R. 235.

tor plaintiff will be liable to costs under the above statute, on failure of his suit, if it appear that he commenced the action without ascertaining that he had a probability of proving his case ^a. The *onus* in making out an exemption from costs under this statute, on the part of an executor plaintiff who has failed in his action, lies on him; because the exemption is an exception from the general rule, under which executors who are plaintiffs, and have failed, are liable for costs ^b: and it is not sufficient for such a plaintiff to shew that the action was brought *bond fide* under legal advice, to try a doubtful point of law, which it was necessary to have decided, in order to obtain an equitable administration of assets in a creditor's suit ^b; or with a fair chance of succeeding ^c: but some misconduct on the part of the defendant, or some other special cause for exemption, must be shewn ^c. and the conduct of the defendant, after action brought, relative to the mode of conducting the defence, will not be considered by the court in exercising their discretion ^d. So, where the plaintiffs had brought an action for the amount of a promissory note as executors, but discontinued the suit, on an *affidavit* of the defendant that no consideration had been given for the note, the court held them to be responsible for the costs, there being reason to suppose they were previously acquainted with the want of consideration ^e. An executor plaintiff however, when he merely sues *en auter droit*, is not liable to costs, on a judgment as in case of a nonsuit ^f. And where an executor was nonsuited, in an action to recover the amount of a policy of assurance, effected on the life of his testator, the court ordered judgment to be entered up for the defendant without costs, under the above statute; it appearing to be the plaintiff's duty to attempt the recovery of the money ^g. The discretion as to costs, in actions by executors, given to the court or a judge by the above act, extends

^a *Wilkinson v. Edwards*, 3 Dowl. Rep. 137. 1 Scott, 173. 1 Bing. N. R. 301. S. C.

^b *Farley v. Briant*, 1 Har. & W. 775.

^c *Southgate v. Crowley*, 1 Hodges, 1. 1 Bing. N. R. 518. 1 Scott, 374. *Brown v. Croley*, 3 Dowl. Rep. 386. 9 Leg. Obs. 348, 9. S. C. *Vaughan, J. dissentiente*. *Godson v. Freeman*, 1 Tyr. & G. 35. 2 Crompt. M. & R. 585. 1 Gale, 329. 4 Dowl. Rep. 543. S. C.

^d *Farley v. Briant*, 1 Har. & W. 775.

^e *Lakin v. Massie*, 4 Dowl. Rep. 239. 1 Gale, 270. 11 Leg. Obs. 119. S. C.;

and see *Prole v. Wiggins*, 3 Bing. N. R. 235.

^f *Pickup v. Wharton*, 2 Crompt. & M. 401. 4 Tyr. Rep. 224. 2 Dowl. Rep. 388. S. C.; and see *Tidd Prac.* 9 Ed. 769. 979.

^g *Lysons v. Barrow*, 10 Bing. 563. 4 Moore & S. 463. 2 Dowl. Rep. 807. S. C.; and see *Quelle (or Quelly) v. Boucher*, 1 Scott, 283. 3 Dowl. Rep. 107. 9 Leg. Obs. 59, 60. S. C.; but see *Spence v. Albert*, 4 Nev. & M. 385. 2 Ad. & E. 785. 1 Har. & W. 7. S. C.

only to cases in which executors were, before that enactment, liable to^a, or exempted^b from the payment of costs. And the power of the judge being co-ordinate with that of the court, the decision of a judge upon the point was holden in one case to be final^c; but the contrary was determined in a subsequent case^d: And where an executor plaintiff seeks to be relieved from costs, under the discretionary power of the courts, the application should be made before taxation; otherwise, if granted, it will be on payment of the costs of the application^e.

By the statute 8 & 9 W. III. c. 11. ^f “where several persons shall be made defendants to any action of *trespass, assault, false imprisonment, or ejectione firmæ*, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if a verdict had been given against the plaintiff, and acquitted all the defendants; unless the judge, before whom the cause is tried, shall, immediately after the trial thereof, in open court, certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant.” This statute was confined to the particular actions mentioned therein; and did not extend to an action of trespass upon the case^g, nor consequently to an action of *trover*^h; neither did it extend to an action of *replevin*ⁱ; nor to an action of *debt* on bond against executors, one of whom was acquitted on a plea of *plene administravit præter*^k. But now, by the law amendment act^l, “where several persons shall be made defendants in any personal action, and any one or more of them shall, upon the trial of such action, have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless the judge, before whom such cause shall be tried, shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.”

Costs, when one of several defendants is acquitted, by stat. 8 & 9 W. III. c. 11. § 1.

By law amendment act.

^a Ashton v. Poynter, 1 Crompt. M. & R. 738. 5 Tyr. Rep. 322. 1 Gale, 57. 3 Dowl. Rep. 465. 9 Leg. Obs. 494. S. C.

^b Spence v. Albert, 4 Nev. & M. 385. 2 Ad. & E. 785. 1 Har. & W. 7. S. C.

^c Maddox (or Maddocks) v. Phillips, 1 Har. & W. 261. 5 Nev. & M. 370. 3 Ad. & E. 198. S. C.

^d Lakin v. Massie, 4 Dowl. Rep. 239. 1 Gale, 270. S. C.

^e Ashton v. Poynter, 1 Crompt. M. & R. 738. 5 Tyr. Rep. 322. 1 Gale, 57. 3

Dowl. Rep. 465. S. C.

^f § 1; and see Tidd Prac. 9 Ed. 986.

^g Dibben v. Cooke, 2 Str. 1005. and see Murray v. Nichols, 6 Bing. 530. 4 Moore & P. 280. S. C.

^h Poole v. Boulton, Barnes, 139.

ⁱ Ingles v. Wadworth, 3 Bur. 1284. 1 Bl. Rep. 355. Say. Costa, 215. S. C.

^k Duke of Norfolk v. Anthony, E. 42 Geo. III. K. B.

^l 3 & 4 W. IV. c. 42. § 32.

Decisions there-
on.

It was formerly holden, that on a joint plea of not guilty to *trespass* and *assault*, if one defendant were found guilty, with one shilling damages and one shilling costs, and the other acquitted, the latter was only entitled to *forty* shillings costs^a. But where three defendants, being sued in *trespass* for assault and false imprisonment, appeared by the same attorney, but severed in pleading, and the same evidence was adduced for all, with the exception of one witness who was called for one of them separately, and that one, being acquitted, the master taxed him forty shillings costs only, the court of Exchequer held that he was entitled, on taxation, to receive from the plaintiff his *aliquot* proportion of the costs incurred by the three on their joint retainer, as well as the costs he had separately incurred, on satisfying the master that he was not indemnified by the other defendants^b. And where, in an action for an irregular distress with a count in *trover*, there were four defendants, one of whom appeared by one attorney, and the other three by another, and at the trial the jury found a verdict against the one appearing separately, and against one of the three appearing jointly, and in favour of the remaining two defendants, the court held that the defendants who had obtained a verdict were entitled to the full costs of their defence, which should be allowed on taxation, and not merely to a sum of forty shillings^c. In an action of *trespass* and false imprisonment against four defendants, the jury found a verdict against two of them, but acquitted the other two defendants, who were police officers, and the judge certified, under the above act, that there was a reasonable cause for making the police officers defendants; but the court held, that notwithstanding such certificate, they were entitled to their full costs, under the *metropolitan police act*, (10 Geo. IV. c. 44. § 41.) the provisions of which were not affected by the law amendment act, which was merely intended to enlarge those of the 8 & 9 W. III. c. 11. § 1.^d

Costs of several
counts, or pleas.

We have already seen^e, that by a late statutory rule^f, "several counts shall not be allowed, unless a distinct subject matter of com-

^a Hughes v. Chitty, 2 Maule & S. 172; and see Thrustout d. Jenkinson v. Wood-year, Barnes, 131. Holroyd v. Breare, 4 Barn. & Ald. 43. 700. Griffith v. Jones, 4 Dowl. Rep. 159. 2 Crompt. M. & R. 333. 1 Gale, 254. 10 Leg. Obs. 462, 3. S. C.

^b Griffiths v. Kynaston, 2 Tyr. Rep. 757; and see Nanny v. Kenrick, 2 Dowl. Rep. 324. 7 Leg. Obs. 509. S. C. Exchec.

^c Griffith v. Jones, 10 Leg. Obs. 462, 3.

^d Humphrey v. Woodhouse, 1 Bing. N. R. 506. 1 Scott, 395. 1 Hodges, 64. 3 Dowl. Rep. 416. 9 Leg. Obs. 414. S. C.

^e Ante, 216, &c. 404, &c.

^f R. Pl. Gen. H. 4 W. IV. reg. 5. 5 Barn. & Ad. Append. ii. 10 Bing. 464. 2 Crompt. & M. 12.

plaint is intended to be established in respect of each; nor shall several pleas, or avowries or cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each." And it should be remembered, that in order to give effect to this rule, it is provided by an auxiliary one ^a, that "upon the trial, where there is more than one count, plea, avowry or cognizance upon the record, and the party pleading fails to establish a distinct subject matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry or cognizance, including those of the evidence, as well as those of the pleadings:" And further, "in all cases in which an application to a judge has been made under the preceding rule ^b, and any count, plea, avowry or cognizance, allowed as therein mentioned, upon the ground that some distinct subject matter of complaint was *bona fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of such plea, avowry or cognizance so allowed, if the court or judge before whom the trial is had shall be of opinion that no such distinct subject matter of complaint was *bona fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry or cognizance so allowed, and shall so certify, before final judgment, such party, so pleading, shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry or cognizance, with respect to which the judge shall so certify."^c It seems that this rule does not apply to demurrers ^d. And where, to a declaration for a libel, the defendant pleaded the general issue and two special pleas, and at the trial the jury found all the issues for the plaintiff and 1*s.* damages, and the judge certified, under the statute 43 Eliz. c. 6. § 2. the court held that the plaintiff was not entitled to the costs of the issues found for him, notwithstanding the rule of *Hil. 4 W. IV. § 7* ^e.

^a R. Pl. Gen. H. 4 W. IV. reg. 7. 5
Barn. & Ad. Append. iv. 10 Bing. 466.

2 Crompt. & M. 16.

^b *Id.* reg. 6.

^c *Id.* reg. 7.

^d *Farley v. Briant*, 5 Nev. & M. 57, 8.
3 Ad. & E. 652, 8. S. C.

^e *Simpson v. Hurdias*, 2 Meeson & W.
84. 5 Dowl. Rep. 304. S. C.

Costs on several counts, or issues, some of which are found for defendant.

It was formerly considered, that wherever a plaintiff succeeded on a trial as to any part of his demand, divided into different counts in his declaration, whether the defendant had pleaded one plea to all the counts jointly, or pleaded to them separately and separate issues had been joined, on some of which he had succeeded, yet he was never allowed costs on that part of the plaintiff's demand which had been found against the plaintiff^a; and the same rule prevailed, where a defendant succeeded on a demurrer as to part of the plaintiff's demand^a: But now, by a general rule of all the courts^b, "no costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant, shall be deducted from the plaintiff's costs." This rule was holden to be prospective, and applicable to all taxations after the commencement of *Easter* term 1834^c.

Decisions thereon, in cases to which the rule applies.

On this rule it has been holden, that a defendant is entitled to deduct the costs of issues on counts found for him, from the plaintiff's costs on the other counts, whether the general issue be pleaded to the whole declaration, or issues are joined on several pleas^d. And accordingly, if a defendant plead the general issue and several special pleas, and the jury find for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings and witnesses on those pleas^e. So, where there were several pleas to the declaration, all of which, with the exception of one, were found for the defendant, and the jury gave a verdict on the one found for the plaintiff for a *farthing* damages, and the judge certified, under the 43 Eliz. c. 6. § 2. to deprive the plaintiff of any more costs than damages; a difficulty having arisen on taxation, as to the construction of the above rule, the judges were of opinion, that the object and intention of it were that the defendant should be

^a *Postan v. Stanway*, 5 East, 264; and see *Paxton v. Popham*, 10 East, 366. *Tidd Prac.* 9 Ed. 971, 2.

^b *R. H.* 2 W. IV. reg. 1. § 74. 3 Barn. & Ad. 385. 8 Bing. 299. 2 Crompt. & J. 189.

^c *Cox v. Thomason*, 2 Crompt. & J. 498. 2 Tyr. Rep. 411. 1 Dowl. Rep. 572. S. C. 5 Car. & P. 533. *n. per Parke, J.*

^d *Cox v. Thomason*, 2 Crompt. & J. 498. 2 Tyr. Rep. 411. 1 Dowl. Rep. 572. S. C.; and see *Knight v. Brown*, 2 Moore

& S. 797. 9 Bing. 643. 1 Dowl. Rep. 730. S. C. *Willson v. Davenport*, 5 Car. & P. 533. *per Parke, J.* *Talbot v. Crocker*, 7 Leg. Obs. 28, 9. *per Parke, J.*: but see *Richards v. Cohen*, 1 Dowl. Rep. 533. 5 Leg. Obs. 383, 4. S. C.

^e *Hart v. Cutbush*, 2 Dowl. Rep. 456. 8 Leg. Obs. 316. S. C. *per Parke, J.* *Spencer v. Hamerton*, 6 Nev. & M. 22. 4 Ad. & E. 413. 1 Har. & W. 700. S. C.; and see *Frankum v. Ld. Falmouth*, 4 Dowl. Rep. 65. 1 Har. & W. 337. 10 Leg. Obs. 428, 9. S. C.

allowed his costs on all issues found for him^a. But where some issues are found for the plaintiff and some for the defendant, though the latter is entitled by the rule, to the costs of the issues found for him, yet he is not entitled to the general costs of the cause, or to the expenses of his own witnesses, unless their evidence related exclusively to the issues found for him^b. If a defendant's pleas however, taken altogether, are sufficient to cover a plaintiff's demand, the defendant will be entitled to the general costs of the cause, although they do not cover it, taken separately^c.

Where, in a declaration for a libel, various parts of one continuous article, in which the plaintiff was not mentioned by name, were applied to him by *innuendoes*, and under the general issue pleaded, the jury negatived the greater part of the *innuendoes*, the court held that the plaintiff was entitled to costs in respect of that part of the libel only which was found to apply to him^d. In *ejectment*, where there was but one count, and the lessor of the plaintiff recovered judgment for part only of the lands claimed, the defendant succeeding as to the chief question in dispute, the court held that the defendant was entitled to have his costs, as to the part found for him, set off against the costs of the lessor of the plaintiff, under the above rule^e. Where several defendants were sued in *trespass*, and a verdict was found for the plaintiff on some of the issues, against some of the defendants, and against him on all the other issues, the plaintiff was holden to be entitled to the balance only of the costs, after deduction of all the costs of all the defendants^f. But where there are several defendants, and one alone employs an attorney for all, the others are not entitled to claim any costs^g. And where a cause is referred to arbitra-

Further decisions.

^a *Milner v. Graham*, 2 Dowl. Rep. 422. 8 Leg. Obs. 140. S. C.; and see *Simpson v. Hurdiss*, 2 Meeson & W. 84. 5 Dowl. Rep. 304. S. C.

^b *Larnder (or Lardner) v. Dick*, 2 Dowl. Rep. 333. 4 Tyr. Rep. 239. 2 Crompt. & M. 389. S. C.; and see *Hart v. Cutbush*, 2 Dowl. Rep. 456. 8 Leg. Obs. 316. S. C. *Frankum v. Ld. Fal-mouth*, 4 Dowl. Rep. 65. 1 Har. & W. 337. 10 Leg. Obs. 428. 9. S. C. *Allenby v. Proudlock*, 5 Nev. & M. 636. 4 Ad. & E. 326. S. C.

^c *Probert v. Phillips*, 2 Meeson & W. 40. 13 Leg. Obs. 223. S. C.; and see *Cousins v. Paddon*, 2 Crompt. M. & R.

547. 5 Tyr. Rep. 535. 1 Gale, 305. 4 Dowl. Rep. 488. S. C.

^d *Prudhomme v. Fraser*, 4 Nev. & M. 512. 2 Ad. & E. 645. 1 Har. & W. 5. S. C.

^e *Doe d. Errington v. Errington*, 1 Har. & W. 502. 4 Dowl. Rep. 602. 11 Leg. Obs. 372. S. C.

^f *Starling v. Cosens*, 3 Dowl. Rep. 782. 2 Crompt. M. & R. 446. *Starving v. Cousins*, 1 Gale, 159. S. C.; and see *Gougenheim v. Lane*, 4 Dowl. Rep. 482. 1 Meeson & W. 136. S. C. *Allenby v. Proudlock*, 5 Nev. & M. 636. 4 Ad. & E. 326. S. C.

tion before issue joined, the rule of *Hil. 2 W. IV.* must be observed on the taxation of costs ^a.

In cases to which the rule does not apply.

The above rule, however, does not apply to *paupers* ^b: and therefore, in an action of *trespass* and false imprisonment brought by a pauper against several defendants, where the jury acquitted some of them, and found a verdict against others, the court held that the costs of such of the defendants who had obtained verdicts, could not be deducted from the plaintiff's costs of the cause ^c. And where immaterial issues are found in favour of the defendant, and judgment is afterwards entered for the plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues ^d. So where, in *trespass*, the jury found for the defendant upon a plea which went to the whole cause of action, and the judge thereupon discharged them as to the other issues, the court held that the defendant was not entitled to the costs of the pleadings or witnesses, in respect of the issues upon which no verdict was given ^d. And where, in *replevin*, the defendant pleaded that the goods belonged to himself and others, as assignees under a commission of bankrupt, and also avowed for taking goods as a distress for rent in arrear; a verdict having been found for the plaintiff, on the issue joined on the plea, and for the defendant on the avowry, the court refused to allow the defendant costs on the issue found for the plaintiff ^e. So where, in *trespass* for seizing goods, the defendants pleaded two pleas, one justifying upon a distress for rent due under a demise, at £5 a-year, and another for £2 10s. and both issues were found for him, the court held that they were not inconsistent: and the judge having certified at the trial, to deprive the plaintiff of costs, the rule for taxing to the defendants the costs of the two issues found for them, was drawn up with this additional clause, 'and that the costs, when so taxed, be paid by the said plaintiff to the said defendants'; but the court held that they had no power to make such an order, and they directed the record to be amended, by an entry of a judgment for the costs of those two issues, upon which the defendants might proceed to obtain their costs, if they thought pro-

^a *Daubuz v. Rickman*, 1 *Hodges*, 75.

^d *Dowl. Rep.* 129. 1 *Scott*, 564. *S. C.*; and see *Milner v. Graham*, 2 *Dowl. Rep.* 422. 8 *Leg. Obs.* 140. *S. C.* *Allenby v. Proudlock*, 5 *Nev. & M.* 636. 4 *Ad. & E.* 326. *S. C.*

^b *Gougenheim v. Lane*, 4 *Dowl. Rep.* 482. 1 *Meeson & W.* 136. 1 *Tyr. & G.*

216. 1 *Gale*, 343. *S. C.*

^c *Goodburne v. Bowman*, 9 *Bing.* 667. 3 *Moore & S.* 69. 2 *Dowl. Rep.* 206. *S. C.*

^d *Vallance v. Evans, (or Adams)*, 1 *Crompt. & M.* 856. 3 *Tyr. Rep.* 865. 2 *Dowl. Rep.* 118. *S. C.*

^e *Middleton v. Mucklow*, 10 *Bing.* 401.

per^a. And if a defendant seek to enter a suggestion to deprive the plaintiff of costs, on the ground that the action ought to have been brought in a court of requests, he cannot at the same time have the costs of issues which have been found in his favour, taxed for him in the superior court^b.

Whether particular costs incurred in relation to the trial of the cause are referable to one issue or another, is a question of fact for the decision of the master alone^c: the court ought not to be called upon to enquire into the correctness of the master's decision upon such question^c. And where, in *ejectment* upon the several demises of *A. & B.* the defendant, being ignorant of the title of *A.* goes to trial, prepared with evidence in answer to the title of *B.* only, and the plaintiff's counsel disclaims the title of *B.* the issue in respect of whose demise is thereupon found for the defendant, and obtains a verdict under the demise from *A.*, the master is justified in allowing the defendant the costs of the evidence so prepared; although, at the trial, the witnesses were examined by the defendant's counsel, and their evidence was offered as against the title of *B.*, but rejected as inapplicable; and although the defendant afterwards moved for a new trial, on the ground of the rejection of the evidence, and the court refused the rule on the same ground^e. So, in an action on the *case*, containing several counts in the declaration, where some issues were found for the plaintiff and some for the defendant, the court held that the master, in taxing the costs, was correct in deducting the costs of the defendant's issues from the plaintiff's costs; and that the lien of the plaintiff's attorney was only upon the balance coming to the plaintiff^d: they also held, that the expense of a witness called by the defendant, whose evidence was substantially directed towards the issues found for the defendant, was properly allowed to him, although he gave some evidence upon the other issues^d.

By another clause of the statute 8 & 9 W. III. c. 11.^e it is enacted, that "if any person shall commence or prosecute any action, in any court of record, wherein, upon *demurrer* either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*" This clause of

How taxed.

Costs on demurrer, by stat. 8 & 9 W. III. c. 11. § 2.

^a Twigg v. Potts, 4 Dowl. Rep. 266.

10. S. C.

^b Jenks v. Taylor, 1 Meeson & W.

^d Eades v. Everatt, 3 Dowl. Rep. 687.

578.

10 Leg. Obs. 333. S. C.

^c Doe d. Smith v. Webber, 4 Nev. & M. 381. 2 Ad. & E. 448. 1 Har. & W.

^e § 2.

the statute did not extend to demurrers to pleas in abatement ^a; nor, as it seems, to any action wherein the defendant would not have been entitled to costs upon a nonsuit or verdict ^b. And where, in an action for a libel against *ten* defendants, three of them demurred to some of the counts of a declaration, and the other defendants went to issue thereon, and all the defendants went to issue upon the other counts, and those defendants who demurred got judgment upon the demurrer, before the issues were tried, the court held that they were not entitled to have their costs taxed upon that judgment, under the above statute ^c. But now, by the law amendment act ^d, "where judgment shall be given, either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf."

By law amendment act.

By whom, and how costs are taxed.

Judges empowered to make regulations, for taxing costs by the officers of each court indiscriminately.

Costs are taxed by the master, in the King's Bench and Exchequer, or prothonotaries in the Common Pleas, upon a bill made out by the attorney for the prevailing party; or, more frequently without a bill, upon a view of the proceedings ^e. But, by the statute 3 & 4 W. IV. c. 42 ^f, reciting that it would tend to the better dispatch of business, and would be more convenient, and better assimilate the practice, and promote uniformity in the allowance of costs, if the officers on the plea side of the courts of King's Bench and Exchequer, and the officers of the court of Common Pleas at *Westminster*, who now perform the duties of taxing costs, were to be empowered to tax costs which have arisen, or may arise, in each of the said courts indiscriminately; it is enacted, that "it shall be lawful for the judges of the said courts, or any *eight* or more of them, of whom the chiefs of each of the said courts shall be *three*, by any rule or order to be from time to time made, in term or vacation, to make such regulations for the taxation of costs, by any of the said officers of the said courts indiscriminately, as to them may seem expedient, although such costs may not have arisen in respect of business done in the court to which such officer belongs, and to appoint some con-

^a *Michlam v. Bate*, 8 Barn. & C. 642. 3 Man. & R. 91. S. C.

^b *Miller v. Seagrave*, Cas. Pr. C. P. 25. *Thrale v. Bishop of London*, 1 H. Blac. 530; but see *Anon. Cas. Pr. C. P. 4. contra.*

^c *Forbes v. Gregory*, (or King,) 1 Cromp. & M. 435. 3 Tyr. Rep. 385. 1 Dowl. Rep. 679. S. C.

^d 3 & 4 W. IV. c. 42. § 34; and see 3 Rep. C. L. Com. 25. 76.

^e *Tidd Prac.* 9 Ed. 989.

^f § 36. And see further, as to *final* costs, *Tidd Prac.* 9 Ed. Chap. XL. p. 945, &c.; and as to *interlocutory* costs, on motions, &c. see the *Index* thereto, tit. *Costs*, p. 1322, 3.

"venient place in which the business of taxation shall¹ be transacted
 "for all the said courts, and to alter the same, when and as it may
 "seem to them expedient."

It was formerly the practice, in the King's Bench and Common Pleas, to give notice to the opposite attorney, of the time when the costs were intended to be taxed: But, in order to enforce it, there must have been a side-bar rule to be present at taxing costs; which rule was obtained from the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, and a copy duly served; after which, if the costs were taxed without notice, the taxation was irregular, and the attorney liable to an attachment^a. In the Exchequer of Pleas, there is a rule^b, that "one day's previous notice of the time of taxing costs, upon rules, orders, town *posteas*, and inquisitions, and a copy of the bill of costs, and *affidavit* to increase, if any, shall be given and delivered by the attorney or attornies of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of service of such notice; and, in the cases of *posteas* and inquisitions in country causes, the notice shall be given *two* days, and the copy and *affidavit* delivered *two* days before such taxation." This rule is imperative; and it is irregular to proceed with the taxation of costs, without complying with it, unless the opposite party chooses to waive his right, which he has the power of doing^c. There is also a general rule of all the courts^d, that "before taxation of costs, *one* day's notice shall be given to the opposite party." On this rule, reasonable costs of serving a notice of taxation on a defendant residing in the country, and having no attorney, will be allowed; and are not to be restricted to the charge for a letter by post^e. The rule of court, however, can only apply to those cases in which a notice of taxation is necessary^f; and it does not seem to be necessary upon a *cognovit*^g. By a subsequent rule of all the courts^h, "notice of taxing costs shall not be

Notice of taxing costs.

Unnecessary, where defendant.

^a Tidd *Prac.* 9 Ed. 989, 90.

^b R. M. 1 W. IV. *reg.* II. § 10. 1 Crompt. & J. 279. 1 Tyr. Rep. 161. And for cases on the construction of this rule, see *Perry v. Turner*, 2 Crompt. & J. 89. *Routledge v. Giles*, *id.* 163.

^c *Wilson v. Parkins*, 13 Leg. Obs. 413.

^d R. T. 1 W. IV. *reg.* VIII. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 472.

^e *Thorpe v. Worthy*, (or *Wordy*), 2 Tyr. Rep. 469. 2 Crompt. & J. 488. 1

Dowl. Rep. 575. S. C.

^f *Griffiths v. Liversedge*, 2 *Dowl. Rep.* 143. 6 Leg. Obs. 206. S. C. *per Patterson, J.* 3 Moore & S. 217. (a.) S. C. cited.

^g *Clothier v. Ess*, 3 Moore & S. 216. 2 *Dowl. Rep.* 731. S. C. *Clarke v. Jones*, 3 *Dowl. Rep.* 277. *per Parke, B.*

^h R. *Pr.* H. 4 W. IV. *reg.* 17. 5 Barn. & Ad. Append. xvii. 10 Bing. 455. 2 Crompt. & M. 6.

has not appeared.

necessary, in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of *Trinity* term 1 W. IV. § 12." On this rule it has been holden, that the defendant, having done what was equivalent to appearing, is entitled to a notice of taxation of the plaintiff's costs^a; but an omission of such notice is not sufficient to induce the court to set aside a judgment and subsequent proceedings^a.

What costs are allowed, when debt amounts to 20*l.* and upwards.

It has been already seen^b, that in actions to which the rule of *Trin.* 1 W. IV. for shortening declarations applies, if the debt amount to 20*l.* and upwards, and the declaration is under *twenty-four folios*, the officer who taxes the costs is authorized to allow for declaration, including instructions, copy and delivery, 1*l.* 18*s.*; and for close copy, in country causes, according to length. The taxing officer is also authorized, according to the regulations adopted by all the courts in the above actions, to allow for interlocutory judgment, including rule to plead, searching for and demanding plea, drawing judgment, *incipitur*, entering on the roll, docket, and attending to sign judgment and to docket, 1*l.* 11*s.* 4*d.*; and for attending to tax, 6*s.* 8*d.*: But the above regulations are not to extend to cases in which several actions are brought on the same bill or note, against several parties thereto: And the taxing officer may allow at his discretion, to a plaintiff or defendant, all such costs as shall reasonably have been incurred by him after commencement of suit, notwithstanding the same may be such as may not heretofore have been allowed between party and party^c: But he is not authorized to allow more than one opinion on evidence, by one barrister or pleader, and one consultation; and the sum allowed for drawing all issues, in fact or in law, in all the courts, is *eight pence per folio*^d.

When sum recovered, &c. does not exceed 20*l.* without costs.

By subsequent directions, given by the courts to their taxing officers in *Hilary* term 4 W. IV.^e it is declared, that "in all actions of *assumpsit*, *debt*, or *covenant*, where the sum recovered, or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* without costs, the plaintiff's costs shall be taxed according to the reduced scale thereunto annexed: Provided, that in case of trial before a judge in one of the superior courts, or judge of assize, if

^a *Lloyd (or Loyd) v. Kent*, 5 Dowl. Rep. 125. 2 Har. & W. 130. 12 Leg. Obs. 821. S. C.; and see *Perry v. Turner*, 2 Crompt. & J. 89. 2 Tyr. Rep. 128. 1 Price N. R. 161. 1 Dowl. Rep. 300. S. C.

^b *Ante*, 215.

^c For the mode of taxing costs, as between attorney and client, see *Tidd Prac.* 9 Ed. 335, 6.

^d *Chapm. Bills of Costs*, 1832. p. 1. 12.

^e 2 Dowl. Rep. 485. *Chapm. K. B.* 3 *Addend.* 132, &c.

the judge shall certify on the *postea*, that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale." These directions seem to extend to writs of inquiry; upon which it has been customary, where damages are given to a less amount than 20*l.*, to tax costs according to the reduced scale prescribed therein ^a. And where the writ having been issued for more than 20*l.*, the plaintiff before execution, judgment having been signed as for want of a plea, had given credit for a cross demand, reducing the amount of his claim to 17*l.*, the court held that the costs should be taxed on the reduced scale ^b. But where a plaintiff had recovered by verdict a sum of money beyond another sum paid into court, the two sums together amounting to more than 20*l.*, the court held that the taxation of costs ought not to be on the reduced scale ^c. On the above *proviso* it has been determined, that it is not necessary for the judge who certifies to hear the cause throughout, in order to enable a plaintiff to obtain full costs ^d. And there is no specific time for giving the certificate of the cause being proper to be tried before a superior judge; but the certificate may be given at any time ^e.

By the above directions it is required, that "at the head of every bill of costs, taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of 20*l.* or not, in the following form: "Debt above *twenty pounds*," or "Debt *twenty pounds*, or under." And it is thereby declared, that "*three shillings and four pence* shall be allowed for drawing the judgment in all cases; that the officers of the court of Exchequer are to allow no *incipiturs* of judgment upon paper, and are to mark the costs upon the *posteas*; that every brief sheet is to contain *eight folios* at the least, which are to be paid for at the rate of 6*s.* 8*d.* per sheet for drawing, and 3*s.* 4*d.* for copying; such parts of the briefs only as are really drawn to be allowed as drawing, the rest to be allowed as copying: that the allowance to witnesses for travelling is to be only the sum actually paid, and that not exceeding *one shilling per mile*, except under special circumstances; and that no fee to counsel is to be allowed on writs of trial, except trials before the judge of the sheriff's court of *London*, or of other courts of record, where attornies are not allowed to prac-

^a Hoopell (or Hoppell) v. Leigh, 3 Scott, 188. 2 Hodges, 107. 5 Dowl. Rep. 40. 12 Leg. Obs. 246. S. C.

^b Savage v. Lipscombe, 13 Leg. Obs. 456. Patterson, J. *dissentiente*.

^c Masters v. Tickler, 2 Har. & W. 81.

^d Nokes v. Fraser, 3 Dowl. Rep. 839. Burchell v. Clark, 9 Leg. Obs. 330, 31.

^e Ivy v. Young, 13 Leg. Obs. 381.

tise, and then *one guinea only*." The fees to be allowed to counsel's clerks are also specified in these directions^a; to which *three* schedules are annexed; 1st, of the costs to be allowed from the commencement of the suit to the notice of trial^b; 2dly, the subsequent costs, where the cause is tried before the sheriff^c; and 3dly, where it is tried at *nisi prius*, and there is a verdict for 20*l.* or under^d.

Reviewing taxation.

If either party be dissatisfied with the allowance of costs, he may apply to the court for a rule to shew cause, why the master or prothonotaries should not review their taxation^e: And where an attorney had charged for a declaration as containing more *folios* than it really contained, and this charge was allowed by the master, the court of King's Bench held it to be a good ground for reviewing the taxation^f. But the *affidavit* in support of the rule must be confined to the objections alleged against the taxation, and not enter into the merits of the cause^g: And although the master, on taxation of costs as between attorney and client, has not jurisdiction to determine whether acts done by the attorney were useful, yet he may determine what were necessary^h. In the Exchequer, a motion to review the master's taxation must be supported by an *affidavit*, that the master has made his *allocatur*ⁱ: And an *affidavit* to ground an order *nisi* for the master to review his taxation, on the ground of overcharge, must point out the specific items thereof, and shew that they were erroneous^k. And no objections to the master's taxation can be entertained, unless they are specified in the *affidavit*, or rule^l. In that court, *affidavits* used before the master on taxation of costs, cannot be read, on shewing cause against a rule for reviewing the taxation, unless they are referred to in the rule; and notice that they will be used, is not sufficient^m. And costs of a rule for reviewing a taxation are not given, where the mistake is with the masterⁿ.

^a 2 Dowl. Rep. 486, 7. Chapm. K. B. 3 *Addend.* 182.

^b 2 Dowl. Rep. 487.

^c *Id.* 487, 8, 9.

^d *Id.* 489, 90. And for bills of costs, made out by one of the taxing officers, in pursuance of these directions, see Chapm. K. B. 3 *Addend.* 134, &c. And for the general charges, as allowed on taxation in all the courts, for writs, attendances, affidavits, pleadings, instructions, notices, and rules, ingrossing, copying, term-fee, and to

counsel's clerks, see *id.* 175, &c.

^e Tidd *Prac.* 9 Ed. 990.

^f *Morris v. Hunt*, 1 Chit. R. 544.

^g *Williams v. Hunt*, *id.* 321.

^h *Heald v. Hall*, 2 Dowl. Rep. 163.

ⁱ *Cleaver v. Hargrave*, *id.* 689.

^k *Daniel v. Bishop*, M'Clel. 61. 13 Price, 129. S. C.

^l *Aliven v. Furnival*, 2 Dowl. Rep. 49.

^m *Cliffe v. Prosser*, *id.* 21.

ⁿ *Ward v. Bell*, *id.* 76.

CHAP. XLI.

Of WRITS of EXECUTION; and the LIABILITY, and RELIEF of SHERIFFS, &c.

IN the present Chapter it is proposed to consider, 1st, the time of suing out writs of execution; 2dly, out of what courts they issue; 3dly, their *teste* and return, &c.; 4thly, the liability of sheriffs and their officers, to answer for the value of goods taken in execution; and 5thly, the relief they are entitled to, under the interpleader act, in execution of process against goods and chattels.

We have already seen^a, that by the speedy judgment and execution act^b, "execution may be issued forthwith, at the return of a writ of inquiry in ordinary cases, which may be made returnable and returned on any day certain, in term or vacation, to be named in such writ, unless the sheriff or other officer, before whom the same may be executed, shall certify^c under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court to set aside the execution of such writ, or one of the judges of the said courts shall think fit to order^d the judgment to be stayed, until a day to be named in such order". We have also seen^e, that by another clause of the same statute^f, "in all cases where the judge before whom the issue is tried, shall, in case the plaintiff shall become nonsuit, or a verdict shall be given for the plaintiff or defendant, certify^g under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by

Time of suing out execution, on writs of inquiry, in ordinary cases.

On nonsuit, or verdict.

^a *Ante*, 294.

^b 1 W. IV. c. 7. § 1.

^c For the form of the under-sheriff's certificate on this statute, see Append. to Tidd *Sup.* 1833, p. 300.

^d For the form of the summons for staying judgment, and judge's order thereon, see *id. ib.*

^e *Ante*, 545.

^f § 2.

^g For the form of a judge's certificate on this statute, see Append. to Tidd *Sup.* 1833, p. 321; and for the cases in which a certificate may be granted thereon, *vide ante*, 535, 6, 7.

Not to affect provision in administration of justice act, relating to writs of possession.

Time of issuing execution on writs of inquiry, for assessing damages on 8 & 9 W. III. c. 11. § 8. or writ of trial.

Out of what court execution issues.

Execution may be issued out of superior courts at *Westminster*, on judgments of C. P. at *Lancaster*.

such verdict, execution may be executed forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term. Provided, that nothing in that act contained shall be deemed to frustrate or make void any provision relating to the issuing of any writ of *habere facias possessionem*, contained in the act passed in the first year of the reign of his present Majesty, intituled an act for the more effectual administration of justice, in *England and Wales*.^a

It should also be remembered, that by the law amendment act^b, "execution may be issued forthwith, at the return of the writ of inquiry for assessing damages on the statute 8 & 9 W. III. c. 11. § 8. (which applies also to the writ for the trial of issues before the sheriff, or judge of a court of record^b;) unless the sheriff, or his deputy, before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, shall certify under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court, for a new inquiry or trial, or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order."

Writs of execution are *judicial* writs, issuing out of the court where the record is, upon which they are grounded^c. And therefore, when the record or transcript of the proceedings is removed into any of his majesty's courts of record at *Westminster*, from a county palatine, or from an inferior court, by *certiorari*, under the statute 19 Geo. III. c. 70. § 4.^d, or 33 Geo. III. c. 68. § 1.^d, the execution issues out of the superior court. And by the late act, for improving the practice and proceedings of the court of Common Pleas of the county palatine of *Lancaster*^e, it is enacted, that "when-
"ever a plaintiff or defendant in any action or suit, in which judgment shall be recovered in the said court of Common Pleas at *Lancaster*, shall remove his person, or goods or chattels, from or
"out of the jurisdiction of the same court, it shall and may be
"lawful for any of the superior courts at *Westminster*, upon a certificate from the prothonotary of the said court of Common Pleas
"at *Lancaster*, or his deputy, of the amount of final judgment obtained in any such action, to issue a writ or writs of execution

^a Stat. 1 W. IV. c. 7. § 5; and see stat. 11 Geo. IV. & 1 W. IV. c. 70. § 38. Tidd *Sup.* 1830, p. 190. *Post*, Chap. XLV.

^b 3 & 4 W. IV. c. 42. § 18. *Ante*, 298.

^c 2 Wms. Saund. 5 Ed. 27. 35. (2.); and see Tidd *Prac.* 9 Ed. 400, 401. 994, 5.

^d Tidd *Prac.* 9 Ed. 401. 995.

^e 4 & 5 W. IV. c. 62. § 31.

"thereupon, for the amount of such judgment, and the costs of such writ or writs and certificate, to the sheriff of any county, &c. against the person or persons, or goods of the party or parties against whom such final judgment shall have been obtained, in such manner as upon judgments obtained in any of the superior courts of common law at *Westminster*." And there is a similar clause in the late act, for the better and more expeditious administration of justice in the stannaries of *Cornwall*^a. Upon the former of these statutes, where a defendant, after judgment in an action in the Common Pleas at *Lancaster*, has removed his *person* out of the jurisdiction of the county palatine, a superior court, upon an *affidavit* of these facts, (without shewing that he has also removed his *goods*,) will order a *capias ad satisfaciendum* to issue^b. And where a party against whom a judgment has been obtained in the Common Pleas at *Lancaster*, has removed out of the jurisdiction, it is necessary, in order to obtain a writ of execution against him, to produce an *affidavit* of the fact of his removal^c.

Of Stannary
courts of Corn-
wall.

At common law, writs of execution must have been *tested* in term time^d, on a day after the judgment was, or might be supposed to have been given: But, by the statute 1 W. IV. c. 7^e, "every execution, issued by virtue of that act, shall and may bear *teste* on the day of issuing thereof; and such execution shall be as valid and effectual as if the same had been issued according to the course of the common law." ^f And, by a subsequent statute^g, "all writs of execution may be *tested* on the day on which the same are issued, and be made returnable immediately after the execution thereof." This statute applies to executions issued on judgments both before and since it passed^h. And there is a similar clause, in the late act for improving the practice and proceedings in the court of Common Pleas of the county palatine of *Lancaster*ⁱ. A writ of execution cannot be *tested* of a term previous to the judgment, although it be issued under the above statute^k. But a *feri facias* on a judgment signed after the defendant's death in vacation, may be

Teste and return
of writs of exe-
cution.

^a 6 & 7 W. IV. c. 106. § 11.

^e § 3.

^b *Lord v. Cross*, 4 Nev. & M. 30. 2 Ad. & E. 81. S. C.; but see *Same v. Same*, 3 Dowl. Rep. 4. 9 Leg. Obs. 46. S. C. *per Littledale*, J. *semb. contra*.

^f *Ante*, 295.

^c *Duckworth v. Fogg*, 2 Crompt. M. & R. 736. 1 Tyr. & G. 172. 4 Dowl. Rep. 396. 11 Leg. Obs. 437. S. C.

^g 3 & 4 W. IV. c. 67. § 2.

^d *Shirley v. Wright*, 2 Spk. 700. 2 Id. Raym. 775. S. C. *Tidd Prac.* 9 Ed. 998.

^h *Rex v. Sheriff of Surrey*, 3 Dowl. Rep. 82.

ⁱ 4 & 5 W. IV. c. 62. § 33.

^k *Englehart v. Dunbar*, 2 Dowl. Rep. 202. 6 Leg. Obs. 237. S. C. *per Patteson*, J. *Peacock v. Day*, 3 Dowl. Rep. 291. 9 Leg. Obs. 252. S. C. *per Littledale*, J.

In C. P. at
Lancaster.

Time between
teste and return
of *ca. sa.* to fix
bail.

Entry in she-
riff's book.

tested on the last day of the preceding term^a. And where the plaintiff having obtained a verdict at the Spring assizes, the defendant died on the 18th of *April*, (the *fourth* day of *Easter* term,) the costs were taxed on the 21st, final judgment signed on the 22nd, and a *feri facias* issued on the same day, tested on the *first* day of the term, the court refused to set aside the *feri facias*, for the irregularity in issuing it after the death of the defendant, without a *scire facias*, the writ being warranted by the judgment which the motion did not impeach^b. In the Common Pleas at *Lancaster*, it is enacted by the statute 4 & 5 W. IV. c. 62^c, that "all writs issued "out of the said court, shall be tested in the name of the chief "justice of that court, or in the case of a vacancy in such office, in "the name of one of the other judges thereof; and that all writs of "execution may, if the parties suing out the same shall see fit, be "made returnable immediately after the execution thereof."

In order to charge the bail, in the King's Bench, when the proceedings were by *bill*, there must formerly have been *eight* days^d, or, if by *original* in that court, or in the Common Pleas^e, *fifteen* days between the *teste* and return of the writ of *capias ad satisfaciendum*; the latter being a case excepted out of the statute 13 Car. II. stat. 2. c. 2. § 7. And in the King's Bench it was holden, that in order to fix bail, the *capias ad satisfaciendum* must be entered *four* days in the public book at the sheriff's office^f. This, however, does not seem to have been deemed necessary in the Exchequer^g: But, by a general rule of all the courts^h, "in actions commenced by *bill*, a *capias ad satisfaciendum* to fix bail shall have *eight* days between the *teste* and return, and in actions commenced by *original*, *fifteen*; and must, in *London* and *Middlesex*, be entered *four* clear days in the public book at the sheriff's office." This rule was made before the *uniformity of process* actⁱ, by which the mode of proceeding by *original* writ in *personal* actions was abolished, and there is an end to the distinction between *original* writ and *bill*, and also before

^a Brocher (or Bracher) v. Pond, 2 Dowl. Rep. 472. 8 Leg. Obs. 302. S. C.

^b Watson v. Maskell, 4 Moore & S. 461. 2 Dowl. Rep. 810. S. C.

^c § 33.

^d Ball v. bail of Russell, 2 Salk. 602.

^e 2 Ld. Raym. 1177. S. C. R. E. 5 Geo. II. reg. III. (a.) K. B.

^f Wass v. Cornett, Barnes, 76. Imp. C. P. Ed. 481,

^g Hutton v. Beuben, 5 Maule & S. 323.

^h 2 Chit. R. 102. S. C.; but see Heyward v. Renard, 3 East, 570. *contra*. Smith v. Parker, 1 M'Clel. & Y. 483.

ⁱ Smith v. Parker, 1 M'Clel. & Y. 483. and see Tidd *Prac.* 9 Ed. 1098, 9. 1126.

^j R. H. 2 W. IV. reg. I. § 77. 3 Barn. & Ad. 385. 8 Bing. 299. 2 Crompt. & J. 189, 90.

^k 2 W. IV. c. 39.

the statute 3 & 4 W. IV. c. 67. by which all writs of execution may be made returnable *immediately* after the execution thereof. And it seems that, notwithstanding this statute, when a *capias ad satisfaciendum* is issued, with the intention of fixing the bail, it should be in the old form, returnable in term; and it is doubtful, whether a *capias ad satisfaciendum*, returnable immediately, is sufficient for that purpose. If a writ of *capias ad satisfaciendum* be sued out against the principal in *vacation*, returnable *immediately* after the execution thereof, pursuant to the 3 & 4 W. IV. c. 67. § 2, with the intention of fixing the bail, and a judge's order be afterwards obtained in the same vacation, for the return of that writ in a certain number of days, under the 15th section of 2 W. IV. c. 39. the bail ought either to have notice given them of the order, or else the order, with the writ, should be entered in the public book, *four* clear days at least before the writ is made returnable by the order; and for want of this, proceedings afterwards taken against the bail were set aside as irregular ^a.

A writ of *feri facias*, or *capias ad satisfaciendum*, need only be *sealed*, in the King's Bench: In the Common Pleas, all executions issuing out of the prothonotaries' office were formerly required to be duly *signed* by the respective prothonotaries, before the same were sealed ^b: But, by a general rule of all the courts ^c, "it shall not be necessary that any writ of execution shall be signed; but no such writ shall be sealed, till the judgment paper, *postea*, or inquisition, has been seen by the proper officer."

Signing and sealing writs of execution.

The liability of the sheriff, and his officers, to answer for the value of goods taken in execution, or their proceeds, principally depends on whether they were, at the time of taking them, the goods of the defendant, or a third person; and, if the defendant has become bankrupt, whether he had committed an act of bankruptcy before the sheriff's entry under the execution: For if a writ of execution be delivered to the sheriff against *A.* who becomes bankrupt before it is executed, the execution is superseded; consequently, the property of the goods is not absolutely bound, as in other cases ^d, by the delivery of the writ to the sheriff, but by its actual execution ^e. And

Liability of sheriff, &c. for goods taken in execution.

^a Kemp v. Hyslop, 4 Dowl. Rep. 687.
¹ Tyr. & G. 77. 1 Meeson & W. 58. 1 Gale, 438. S. C.

^b R. M. 1654. § 6. C. P.; and see Tidd Prac. 9 Ed. 990. 1027, 8.

^c R. H. 2 W. IV. reg. 1. § 75. 3 Barn. & Ad. 385. 8 Bing. 299. 2 Crompt. & J. 189.

^d Tidd Prac. 9 Ed. 1000.

^e Smallcomb v. Cross, 1 Ld. Raym.

where goods are seized under a *feri facias*, the same day that the defendant commits an act of bankruptcy, evidence should be given to prove at what time of the day the goods were seized, and the act of bankruptcy was committed^a.

Sheriff liable in trover, for goods taken in execution after an act of bankruptcy, though he has no notice of it.

A sheriff, who takes in execution the goods of a trader, after he has committed an act of bankruptcy, is liable in *trover* to his assignees, for the value of the goods, although he has no notice of the act of bankruptcy, and a commission has not been sued out thereon, at the time of the execution^b. So, a sheriff is liable in *trover*, for having sold, after notice of assignment to the provisional assignee, the goods of an insolvent, taken in execution under a judgment on *cognovit*, after the commencement of the insolvent's imprisonment, but before the assignment to the provisional assignee^c. And if a sheriff take in execution the goods of a defendant, who afterwards becomes bankrupt, and sell at one time, after the bankruptcy, sufficient goods to satisfy both that execution and also another which was delivered to him after an act of bankruptcy, the assignees may recover against him in *trover*, for such of the goods as were sold after he had raised money enough to satisfy the first execution^d. But *trespass* will not lie by the assignees of a bankrupt against a sheriff, for taking the bankrupt's goods in execution, after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell^e. In

Aliter, in trespass.

252. *per Holt*, Ch. J.; and see 2 Eq. Cas. Abr. 381. *Coppingdale v. Bridgen*, 2 Ken. 542.

^a *Sadler v. Leigh*, 4 Campb. 197.

^b *Price v. Helyar*, 4 Bing. 597. 1 Moore & P. 541. S. C.; and see *Coopers v. Chitty*, 1 Ken. 395. 1 Bur. 20. 1 Blac. Rep. 65. S. C. *Hitchin (or Kitchin) v. Campbell*, 2 Blac. Rep. 827. 829. 3 Wils. 304. S. C. *Aldridge v. Ireland*, 1 Taunt. 273. 2 Crompt. & J. 34, 5. *Lazarus v. Waithman*, 5 Moore, 313. *Dillon v. Edwards*, 2 Moore & P. 550. *Vaughan v. Wilkins*, 1 Barn. & Ad. 370. *Carlisle v. Garland*, 5 Moore & P. 102. 7 Bing. 298. S. C. *Garland v. Carlisle*, 10 Bing. 452. 4 Moore & S. 24. 3 Tyr. Rep. 705. 2 Crompt. & M. 31. S. C. in Error. *Dillon v. Langley*, 2 Barn. & Ad. 131; and see *id.* 135. (a.) *Young v. Marshall*, 8 Bing.

43. 1 Moore & S. 110. S. C. *Crosfield v. Stanley*, 4 Barn. & Ad. 87. 1 Nev. & M. 668. S. C.; but see *Timbrell v. Mills*, 1 Blac. Rep. 305. 2 Crompt. & J. 34, 5. S. C. cited. *Balme v. Hutton*, 2 Crompt. & J. 19. 2 Tyr. Rep. 17. S. C. *semb. contra*. The judgment however, of the court of Exchequer, in the latter case, was reversed, on a writ of error, by a majority of the judges in the Exchequer Chamber. 3 Moore & S. 1. 9 Bing. 471. 1 Crompt. & M. 262. 2 Tyr. Rep. 620. S. C. 4 Barn. & Ad. 90. (a.)

^c *Groves v. Cowham*, 10 Bing. 5. 3 Moore & S. 352. 6 Leg. Obs. 458. S. C.

^d *Stead v. Gascoigne*, 8 Taunt. 527. *Batchelor v. Vyse*, 4 Moore & S. 552; but see *Same v. Same*, 1 Moody & R. 381. S. C. *semb. contra*.

^e *Smith v. Milles*, 1 Durnf. & E. 475.

trover by the assignees of a bankrupt, for goods taken by the sheriff under an execution, it appeared that the goods were taken about the time of the year at which the sheriffs were changed, and that a witness, after the present cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned: This form of return was signed by the defendant as sheriff; and it was ruled at *nisi prius*, to be sufficient evidence that he was the sheriff who executed the writ; and that if the writ, when produced at the trial, had his name erased, and the name of the previous sheriff substituted, it would be a question for the jury, whether the substitution was made to correct a mistake, or to defeat the plaintiff*.

Trover against late, or present sheriff.

It should be observed, however, that by the statute 6 Geo. IV. c. 16 b. "all executions against the goods and chattels of any bankrupt, *bonâ fide* executed or levied more than *two* calendar months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed: Provided the person or persons, at whose suit such execution shall have issued, had not at the time of executing or levying the same, notice of any prior act of bankruptcy by him committed."

Executions executed without notice, &c. more than two calendar months before commission, valid.

But, by a subsequent clause of the same statute^c, "no creditor having security for his debt, or having made any attachment in *London*, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive, upon any such security or attachment, more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt, before the bankruptcy: Provided, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateable with such creditors." Therefore, where *A.* obtained a judgment, by confession or *nil dicit*, against *B.* and issued a *feri facias*, under which *B.*'s goods were seized, and whilst the goods remained unsold in the sheriff's hands, *B.* committed an act of bankruptcy, on which a commission was issued, and the sheriff, after notice of the commission, sold the goods, and paid over the proceeds to *A.* it was holden, that the amount might be recovered from the sheriff, by the

Creditor having security for his debt, not to receive more than other creditors.

Proviso as to execution, on judgment by default, &c.

To what cases statute applies.

and see *Hitchin v. Campbell*, 2 Blac. Rep.

629. *Ward v. Clarke*, 1 Moody & M.

497. per *Ld. Tenterden*, Ch. J.

* *Whitehouse v. Atkinson*, 3 Car. & P.

844. per *Ld. Tenterden*, Ch. J.

^b § 81. and see stat. 49 Geo. III. c.

121. § 2.

^c § 106.

assignee of *B.* as money had and received to his use^a. And an execution on a final judgment, following a judgment by *nil dicit* in *assumpsit*, was holden to be within the *proviso* of the 6 Geo. IV. c. 16. § 108. although there was no concert between the parties, and the judgment was obtained before the act came into operation^b.

To what not.

The above clause, however, only applied to creditors having *security* for their debts, at the time of the bankruptcy: And therefore, where *A.* having a debt from *B.* secured to him by warrant of attorney, entered up judgment by *non sum informatus*, issued a *feri facias*, and took from the sheriff a bill of sale of the goods seized, and *B.* having soon afterwards become bankrupt, his assignees took possession of and sold the goods so transferred to *A.* who brought an action of *trover* for them, the court held that he was not a creditor, having security for his debt, within the above statute, and that he was entitled to recover^c. So where judgment was entered up on a warrant of attorney, given by two joint traders, and a *feri facias* issued, returnable on the *second of May*; on the *first* of that month, the sheriff's officer received from the defendant the money directed to be levied; on the *second of May*, one of them committed an act of bankruptcy, and the other on the *fifth*; on the *eleventh*, a commission of bankrupt issued; and on the *nineteenth*, the sheriff paid over the money to the execution creditor; the court held, in an action by the assignees, that such creditor was entitled to retain it, not being a creditor having a security at the time of the bankruptcy^d. And it seems to be now settled, by the above and other cases, that where goods are taken and sold by the sheriff, before an act of bankruptcy, under a *feri facias*, on a judgment obtained by default, confession, or *nil dicit*, the execution creditor is entitled to the proceeds, though they still remain in the hands of the sheriff^d; and even though the act of bankruptcy was committed before the return of the writ^e. In the latest case upon the subject^f, where the sheriff, under a *feri facias*, upon a judgment founded on a warrant of attorney, seized at *eleven*

^a Notley v. Buck, 2 Man. & R. 68. 8 Barn. & C. 160. S. C.

^b Cumming v. Welsford, 6 Bing. 502. 4 Moore & P. 238. S. C.

^c Wymer v. Kemble, 6 Barn. & C. 479. 9 Dowl. & R. 511. S. C.; and see Taylor v. Taylor, 5 Barn. & C. 392. 8 Dowl. & R. 159. S. C. *In re Washbourn*, 8 Barn. & C. 444. 2 Man. & R. 374. S. C. Godson v. Sanctuary, 4 Barn. & Ad. 255.

1 Nev. & M. 52. S. C.

^d Morland v. Pellatt, 8 Barn. & C. 722.

8 Man. & R. 411. S. C.

^e Higgins v. M'Adam, 3 Younge & J. 1. *Id.* 16, 17, 18. *in notis.* Fox v. Burbridge, H. 9 & 10 Geo. IV. K. B. 3 Younge & J. 18. *in notis.*

^f Godson v. Sanctuary, 4 Barn. & Ad. 255. 1 Nev. & M. 52. S. C.

o'clock on the 13th *August*, and a commission of bankrupt issued against the debtor at a later hour of the 13th *October*, in the same year, and the sale took place subsequently to the issuing of the commission; it was holden first, that the seizure was a *levying*, within 6 Geo. IV. c. 16. § 81; secondly, that more than *two* calendar months had elapsed between the seizure and the issuing of the commission; and thirdly, that the 108th section of the statute applied only to judgments upon which execution had been sued out, and seizure made, within *two* calendar months before the issuing of the commission, and not to any case protected by the 81st section. And now, by the statute 1 W. IV. c. 7^a, "no judgment signed, "or execution issued, after the passing of that act, on a *cognovit* " *actionem* signed after declaration filed or delivered, or judgment " by default, confession, or *nihil dicit*, according to the practice of " the court, in any action commenced *adversely*, and not by collu- " sion, for the purpose of fraudulent preference, shall be deemed or " taken to be within the provision of 6 Geo. IV. c. 16."^b This statute, however, does not extend to judgments on warrants of attorney, though given without collusion, or intention of fraudulent preference^c.

By stat. 1
W. IV. c. 7.
§ 7.

Having considered, in a preceding Chapter^d, such of the provisions of the *Interpleader* act^e, as relate to the property in money or goods, where claims are made by different parties, one of whom has brought an action against the person in possession of them, and the defendant does not claim any interest therein; it may here be proper to notice those which are calculated for the relief of *sheriffs*, and other officers, in execution of process against goods and chattels.

Provisions of
stat. 1 & 2 W.
IV. c. 58. § 6.
for relief of
sheriffs, &c.

Previously to this statute, if the property of goods had been disputed, which frequently happened, on a commission of bankrupt, &c. the courts, on the suggestion of a reasonable doubt, would have protected the sheriff, by enlarging the time for making his return, till the right were tried between the contending parties, or one of them had given him a sufficient indemnity^f: The rule for this purpose was a

Relief of sheriff,
&c. at common
law, by enlarg-
ing time for
making his re-
turn.

^a § 7.

^b § 108. and see 4 Leg. Obs. 205. (i.)
Tidd *Prac.* 9 Ed. 570. 1009, 10.

^c *Crosfield v. Stanley*, 4 Barn. & Ad.
87. 1 Nev. & M. 668. S. C.

^d Chap. XX. p. 270, &c.

^e 1 & 2 W. IV. c. 58. § 1, &c.

^f *Semple v. Ld. Newhaven*, M. 24 Geo.
III. K. B.; and see *Wilson v. Aldridge*,
8 Mod. 315. *Timbrell v. Mills*, 1 Blac.
Rep. 205, 6. *Shaw v. Tunbridge*, 2 Blac.
Rep. 1064. *Raines v. Nelson*, *id.* 1181.
Wheeler v. Bramah, 3 Campb. 340. *per*
Ld. *Ellenborough*, Ch. J. *Keightley v.*

rule to shew cause^a. And the court of King's Bench, upon the application of the sheriff, enlarged the time for his making a return to a writ of *feri facias*, upon suggestion of a reasonable doubt, whether the goods seized under the writ were not bound by an *extent* afterwards issued, at the suit of the crown, for malt duties, for the purpose of inducing the plaintiff to go into the court of Exchequer, and there contest the question of right with the crown in a more eligible manner than in that court^b. So, where it appeared by *affidavit* that writs of *extent* and *feri facias* had been issued on the same day, the court of King's Bench, for protecting the sheriff, refused to allow a *venditioni exponas* to be issued, on the return of the *feri facias*, to compel him to sell the goods under it^c. So, where a bankrupt brought one action, and his assignees another, against the sheriff, the court allowed the latter to pay the money levied into court, and stayed the proceedings, until the trial of an issue between the bankrupt and his assignees^d. And in general, when an action was brought against the sheriff, by the assignees of a bankrupt, for taking goods in execution after a bankruptcy, the courts would assist the sheriff, by staying the proceedings until he was indemnified, on proper and equitable terms^e: and, in one case^f, the terms imposed by the court of King's Bench were, the sheriff's paying over the money levied to the assignees, with the costs of the action up to that time, being allowed his poundage, and the expenses incurred in the execution. But the costs

Birch, *id.* 523. *per* Ld. Ellenborough, Ch. J. Barnard v. Leigh, 1 Stark. Ni. Pri. 45. *per* Ld. Ellenborough, Ch. J. Ledbury v. Smith, 1 Chit. Rep. 294. Rex v. Sheriff of Devon, *id.* 643. Etchels v. Lovatt, 9 Price 54. Burr v. Freethy, 1 Bing. 71. Bernasconi v. Fairbrother, 7 Barn. & C. 379. Beavan v. Dawson, 6 Bing. 566. 4 Moore & P. 387. S. C. Ibberson v. Dica, 1 Leg. Obs. 109. *per* Littleale, J. Same v. Same, *id.* 398. *per* Taunton, J. Solari v. Randall, *id.* 159. *per* Littleale, J. Anon. 2 Leg. Obs. 334. *per* Taunton, J.

^a Ledbury v. Smith, 1 Chit. R. 294.

^b Wells v. Pickman, 7 Durnf. & E. 174. Thurston v. Thurston, 1 Taunt. 120. *accord.*

^c Anon. 1 Chit. Rep. 643. *a.*; and see Anon. 2 Chit. R. 390. Swain v. Morland, Gow, 39. 1 Brod. & B. 370. S. C. Rex v. Cooke, 1 M'Clel. & Y. 196.

^d Jones v. Perry, T. 21 Geo. III. K. B.

^e M'George v. Birch, 4 Taunt. 585. King v. Bridges, 7 Taunt. 294. 1 Moore, 43. S. C. Probinia v. Roberts, 1 Chit. R. 577. *Id.* 643. (*a.*) Anon. 2 Chit. R. 204. Venables v. Wilks, 4 Moore, 339. Bernasconi v. Fairbrother, 7 Barn. & C. 379. Beavan v. Dawson, 6 Bing. 566. 4 Moore & P. 387. S. C. Ibberson v. Dica, 1 Leg. Obs. 109. *per* Littleale, J. Same v. Same, *id.* 398. *per* Taunton, J. Solari v. Randall, *id.* 159. *per* Littleale, J. Anon. 2 Leg. Obs. 334. *per* Taunton, J.; but see Butler v. Butler, 1 East, 338. Parker v. Pistor, 3 Bos. & P. 288. Hartley v. Stead, 8 Moore, 466. Colley v. Hardy, 5 Man. & R. 123.

^f Probinia v. Roberts, 1 Chit. R. 577; and see *id.* 643. *a.*

of applying to the court, for enlarging the time for making his return, were not in general allowed him ^a.

At length, by the above statute ^b, reciting that whereas difficulties sometimes arose in the execution of process against goods and chattels, issued by or under the authority of the courts therein mentioned, by reason of claims made to such goods and chattels by assignees of bankrupts, and other persons, not being the parties against whom such process issued, whereby sheriffs and other officers were exposed to the hazard and expense of actions, and it was reasonable to afford relief and protection in such cases, to such sheriffs and other officers; it is enacted, that "when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court ^c, as well the party issuing such process, as the party making such claim; and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities thereinbefore contained, and make such rules ^c and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court."

Relief of sheriff, and other officers, in execution of process against goods and chattels, by stat. 1 & 2 W. IV. c. 58. § 6.

This statute was intended to afford relief and protection to sheriffs and other officers, acting in the execution of process against goods and chattels; and in arranging the decisions thereon, it may be proper to consider, 1st, in what cases the courts will or will not relieve the sheriff; 2dly, the proceedings thereon, when the adverse parties do or do not appear; and 3dly, the costs of such proceedings. The statute extends to all cases where any claim is made to goods or chattels taken, or intended to be taken, in execution, under any process issued by or under the authority of any of his majesty's courts of law at *Westminster*, or the court of Common Pleas of the county palatine of *Lancaster*, or the court of Pleas of the county palatine of *Durham*. And the courts will relieve the sheriff, under the above statute, in the case of a conflicting claim on property seized

Intention of this statute, and arrangement of decisions thereon.

In what cases the court will relieve the sheriff.

^a *Rex v. Cooke*, 1 M'Clel. & Y. 196, 9.; and see *Tidd Prac.* 9 Ed. 1017, 18.

^b 1 & 2 W. IV. c. 58. § 6.

^c For rules of court on this statute, see *Append. to Tidd Sup.* 1833, p. 332, &c.

by him, though that claim be only of a *lien* on the property^a. The circumstance of the goods seized being in the possession of a stranger, and not of the defendant, against whom the execution issued, does not prevent the sheriff from applying to the court, under the above act^b. So, if an execution creditor abandon his process against goods seized under a *feri facias*, in favour of a claimant, the sheriff has still a right of coming to the court, even after the goods are sold^c. And it is not necessary for the sheriff to apply to the different parties for an indemnity, before he applies to the court under the interpleader act^d; nor is he bound to accept an indemnity from the execution creditor^e: And he need not wait till an action is brought against him, before he applies to the court for relief^f. But the court will not give relief to the sheriff, unless an actual claim appears to have been made^g: Giving notice of a *fiat* in bankruptcy having issued, is not equivalent to a claim by the assignees to the goods sold^h. And in order to entitle the sheriff to relief, it must not only appear that the claim has been made, but also that there has been something done under it, on the part of the alleged claimants, which shews that they intend to enforce their claims against the property seizedⁱ. It is also said, that before the sheriff applies to the court for relief, he is bound to inquire into the nature of the claims set up by the adverse parties^l.

In what not.

The interpleader act does not apply to claims in equity^k: And where the sheriff had levied under a *feri facias*, and, while in possession, he received notice that other writs of execution had been issued against the defendant's goods, and that the first execution creditor was not entitled to the whole proceeds of the levy, the court held that the sheriff was not entitled to relief under the above statute^l. So, where the sheriff had seized goods in execution, which

^a Ford v. Baynton, 1 Dowl. Rep. 357.

⁴ Leg. Obs. 125. S. C. per Taunton, J.

^b Allen v. Gibbon, 2 Dowl. Rep. 292.

^c Baynton v. Harvey, 3 Dowl. Rep. 344.

^d Crossly v. Ebers, 1 Har. & W. 216.

^e Levy v. Champneys, 2 Dowl. Rep. 454. 8 Leg. Obs. 286. S. C. per Parke, J.

^f Green v. Brown, 3 Dowl. Rep. 337. Smith v. Bowell, 9 Leg. Obs. 348. S. C. per Patteson, J.

^g Bently v. Hook, 2 Dowl. Rep. 339. 2 Crompt. & M. 426. 4 Tyr. Rep. 229. S. C.; and see Parker v. Linnett, 2 Dowl.

Rep. 562. per Patteson, J.

^h Isaac v. Spilsbury, 10 Bing. 3. 3 Moore & S. 341. 2 Dowl. Rep. 211. 6 Leg. Obs. 458. S. C.

ⁱ Bishop v. Hinxman, 2 Dowl. Rep. 166.

^k Sturgess v. Claude, 1 Dowl. Rep. 505. per Patteson, J.; and see Holmes v. Mentze, 5 Nev. & M. 563. 4 Ad. & E. 127. 4 Dowl. Rep. 300. 11 Leg. Obs. 133. S. C.

^l Salmon v. James, 1 Dowl. Rep. 308. Anon. 4 Leg. Obs. 141. S. C. per Taunton, J.; and see Day v. Waldo, 1 Dowl.

were under a distress for rent due to the landlord, the court refused to grant him relief, though he had applied for indemnity to the execution creditor, which had been refused ^a. But where the sheriff, having seized goods under a *fiery facias*, received notice, before sale, of the landlord's claim for rent in arrear, and afterwards of a *fiat* of bankruptcy, the court held that the assignees were entitled to the goods, the landlord not having made a distress for his rent ^b. If a claim be made by a person as partner of the defendant, on property seized by the sheriff, the court will not grant relief to the latter, under the interpleader act, but will compel the plaintiff to indemnify him, if he deny the partnership ^c.

A sheriff is not entitled to relief, under the above act, where he has paid over the proceeds of the execution to the judgment creditor ^d, though he had no notice of any claim until after he had paid over the money ^e, or though he may be willing to bring a similar amount into court ^f; nor is he so entitled, where he has delivered up part of the goods to the claimant ^g. And where it appears that the under-sheriff is the plaintiff in the action, in which the writ of execution has been issued and executed, the court will not interfere to relieve the sheriff under the act, although the sheriff himself swears, in the usual way, that he does not collude either with the execution creditor, or the claimant whom he seeks to bring before the court, for the adjustment of their respective claims on the property seized ^h. So where the sheriff, or his under-sheriff, is placed in circumstances which give him an interest on either side, the court will not relieve him ⁱ. And where a sheriff applied for relief, and it appeared that he had been guilty of neglect, the court refused to relieve him from any liability occasioned thereby ^k.

Rep. 523. 5 Leg. Obs. 427, 8. S. C. *per Parke, J.*

^a Haythorn v. Bush, 2 Dowl. Rep. 641. 2 Crompt. & M. 689. S. C.

^b Gethin v. Wilks, 2 Dowl. Rep. 189. 6 Leg. Obs. 237. S. C. *per Taunton, J.*

^c Holmes v. Mentze, 4 Dowl. Rep. 300. 5 Nev. & M. 563. 4 Ad. & E. 127. 1 Har. & W. 606. 11 Leg. Obs. 133. S. C.

^d Anderson v. Calloway, 1 Crompt. & M. 182. 1 Dowl. Rep. 636. S. C. Chalou v. Anderson, 3 Tyr. Rep. 237; and see Devereux v. John, 1 Dowl. Rep. 548. 5 Leg. Obs. 431. S. C. *per Parke, J.*

^e Scott v. Lewis, 1 Gale, 204. 4 Dowl.

Rep. 259. 2 Crompt. M. & R. 289. S. C.

^f Inland (or Ireland) v. Bushell, 5 Dowl. Rep. 147. 2 Har. & W. 118. 12 Leg. Obs. 245. S. C.

^g Braine v. Hunt, 2 Dowl. Rep. 391.

^h Tyr. Rep. 243. 2 Crompt. & M. 418. S. C.

ⁱ Ostler v. Bower, 4 Dowl. Rep. 605. 1 Har. & W. 653. 11 Leg. Obs. 273, 4. S. C. *per Patteson, J.*

^k Dudden (or Duddin) v. Long, 1 Bing. N. R. 299. 1 Scott, 281. 3 Dowl. Rep. 139. S. C.

^l Brackenbury v. Laurie, 3 Dowl. Rep. 180.

Application for relief, to what court.

At what time.

The application by the sheriff for relief under the *sixth* section of the act, must be made to the court out of which the execution issued; or, if the process issued out of different courts, directed to the same sheriff, the latter must apply for relief to the respective courts out of which the process issued ^a. And it cannot be made, as under the *first* section, to a judge at chambers ^b. But after the rule has been granted by the court, cause may it seems be shewn at chambers ^c. It is also a rule, that if a sheriff wish to obtain relief, he must come to the court promptly ^d, or in a reasonable time after he has notice of the claim ^d: And if a sheriff receive notice on the 2d *January*, of a claim of goods seized by him under a *feri facias*, he will not be entitled to relief under the interpleader act, unless he come to the court in *Hilary* term ^e. But a late application will, under circumstances, be allowed ^f. And it has been holden that a sheriff is early enough in his application, if he come to the court within *eleven* days after notice of an intended claim ^g. So, if a sheriff, who has seized goods under a *feri facias*, receive notice of an intended *stat* of bankruptcy against the defendant, he will be entitled to relief under the interpleader act, if he come to the court on the *second* day of the term after the assignees are appointed ^h. But the court refused to give a sheriff relief under the interpleader act, where a *feri facias* had been delivered to him *two* months before notice of

^a *Bragg v. Hopkins*, 2 Dowl. Rep. 151. 6 Leg. Obs. 13. S. C. *per Patterson*, J.

^b *Shaw v. Roberts*, 2 Dowl. Rep. 25. 6 Leg. Obs. 444, 5. S. C. *Brackenbury v. Laurie*, 3 Dowl. Rep. 180. *per Alderson*, B. *Smith v. Wheeler*, 1 Gale, 15. 3 Dowl. Rep. 431. 9 Leg. Obs. 318. S. C. *Poweler v. Lock*, 4 Nev. & M. 852, 3, *per* *Ld. Denman*, Ch. J. *Beames v. Cross*, 4 Dowl. Rep. 122. *Hailey v. Disney*, 1 Hodges, 189.

^c *Poweler v. Lock*, 4 Nev. & M. 852, 3. *per* *Ld. Denman*, Ch. J. *Beames v. Cross*, 4 Dowl. Rep. 122. *Hailey (or Haines) v. Disney*, 1 Hodges, 189. 2 Scott, 188. S. C. *per Gaslee*, J.; and see *Matthews v. Sims (or Sill)*, 5 Dowl. Rep. 234. 13 Leg. Obs. 189. S. C.; but see *Shaw v. Roberts*, 2 Dowl. Rep. 25. 6 Leg. Obs. 444, 5. S. C. *Brackenbury v. Laurie*, 3 Dowl. Rep. 180, *per Alderson*, B. *Smith v. Wheeler*, 1 Gale, 15. 3

Dowl. Rep. 431. 9 Leg. Obs. 318. S. C. *contra*.

^d *Devereux v. John*, 1 Dowl. Rep. 548. *Cooke v. Allen*, 1 Crompt. & M. 542. 3 Tyr. Rep. 586. 2 Dowl. Rep. 11. 6 Leg. Obs. 221. S. C. *Dixon v. Ensell*, 2 Dowl. Rep. 621; and see *Braine v. Hunt*, 4 Tyr. Rep. 243. *Alemore v. Adeane*, 3 Dowl. Rep. 498. 10 Leg. Obs. 12, 13. S. C.

^e *Ridgway v. Fisher*, 3 Dowl. Rep. 567. 1 Har. & W. 191. 10 Leg. Obs. 136. S. C. *per Williams*, J.

^f *Dixon v. Ensell*, 2 Dowl. Rep. 621; and see *Barker v. Phipson*, 3 Dowl. Rep. 590. 1 Har. & W. 191. 10 Leg. Obs. 136, 7. S. C.

^g *Skipper v. Lane*, 2 Dowl. Rep. 784. 4 Moore & S. 283. S. C.; and see *Dixon v. Ensell*, 2 Dowl. Rep. 621.

^h *Barker v. Phipson*, 3 Dowl. Rep. 590. 1 Har. & W. 191. 10 Leg. Obs. 136, 7. S. C.

a *fiat* having issued against the defendant, and no reason was assigned for the delay in the execution ^a.

The *affidavit* in support of the application, should state the seizure of the goods by the sheriff under the execution, and that he had received notice of the claim from the party or parties by whom it was made ^b: and where there is delay, or any circumstance to be accounted for, the sheriff must make a special *affidavit*, stating the facts; and no supplemental *affidavit* will be allowed, when cause is shewn against the rule ^c. It does not seem to be necessary for the sheriff in his *affidavit* to deny collusion, in order to obtain relief under the above act ^d; nor to state that an application has been made to the execution creditor, or to the claimant, for an indemnity ^e. Where the sheriff obtains a rule for relief, the claimants may appear, without taking office copies of the *affidavits* on which the rule was obtained ^f: and affidavits, on shewing cause, are in time, if sworn at any time before cause is shewn ^g. A claimant called upon by a rule under the interpleader act, to come in and state his claim, must give the particulars upon his *affidavit*, to enable the court to decide, even whether he is to be made a party to an issue ^h. And when the sheriff applies to the court for relief under the above act, no one has a right to be heard against the rule, unless he is called upon thereby, though he is in fact a claimant ⁱ: and if he be called on in one character, he cannot appear in another ^j. But where a rule *nisi* had been obtained, under the interpleader act, and the defendant afterwards became a bankrupt, his assignees were admitted as parties to the rule ^k.

Affidavit in support of application.

^a *Lashmar v. Claringbold*, 2 Har. & W. 87.

^b *Northcote v. Beauchamp*, 1 Moore & S. 158.

^c *Cooke v. Allen*, 1 Crompt. & M. 542. 3 Tyr. Rep. 586. 2 Dowl. Rep. 11. S. C.

^d *Donniger v. Hinxman*, (or Hinksman,) 2 Dowl. Rep. 424. 7 Leg. Obs. 252. S. C. *per Littledale, J.* *Dobbins v. Green*, 2 Dowl. Rep. 509. 8 Leg. Obs. 397. S. C. *per Patteson, J.* *Boond v. Woodall*, 1 Tyr. & G. 11. 2 Crompt. M. & R. 601. *Bond v. Woodhall*, 4 Dowl. Rep. 351. 11 Leg. Obs. 374. S. C.; but see *Anderson v. Calloway*, 1 Crompt. & M. 182. 1 Dowl. Rep. 636. S. C. *Cooke v. Allen*,

1 Crompt. & M. 542. 3 Tyr. Rep. 586. 2 Dowl. Rep. 11. 6 Leg. Obs. 221. S. C. *semb. contra.*

^e *Wills v. Popjoy*, 10 Leg. Obs. 12. *per Williams, J.*; but see *Levy v. Champneys*, 2 Dowl. Rep. 454. 8 Leg. Obs. 286. S. C. *per Parke, J.* *Ante*, 576, 7.

^f *Mason v. Redshaw*, 2 Dowl. Rep. 595.

^g *Braine v. Hunt*, 2 Dowl. Rep. 391.

^h *Powell (or Poweler) v. Lock*, 1 Har. & W. 281. 3 Ad. & E. 315. 4 Nev. & M. 852. S. C.

ⁱ *Clarke v. Lord*, 2 Dowl. Rep. 55. Excheq.

^j *Kirk v. Clark*, 4 Dowl. Rep. 363. 11 Leg. Obs. 436. S. C.

Proceedings on appearance of parties.

By action, or feigned issue.

Staying proceedings against sheriff, &c.

Barring claim, when claimant, or execution creditor, does not appear.

In the exercise of the powers and authorities given by the act, if the parties appear, the court will either discharge the rule, in which case the sheriff is entitled to a reasonable time to return the writ, before an attachment can issue ^a; or they will order the question of property to be tried in an action, or on one or more feigned issue or issues, and direct which of the parties shall be plaintiff or defendant on such trial ^b; or, with the consent of the plaintiff and party making the claim, their counsel or attorneys, the court will dispose of the merits of their claims, and determine the same in a summary manner ^c. On an application by the sheriff for relief, the court, if there be any doubt, will not try the merits of the respective claims upon *affidavit* ^d; but direct the same to be tried in an action against the sheriff, or by a feigned issue ^e; in which the claimant should it seems be the plaintiff, and the execution creditor the defendant ^f. And the court will, in such case, order the proceedings against the sheriff to be stayed, until the trial of the action or feigned issue; and in the mean time, give such directions respecting the sale of the goods, and application of the proceeds or value thereof, as shall appear to be just, according to the circumstances of the case. And where, in an issue under the interpleader act, the declaration states that "divers goods and chattels" were seized under a *feri facias*, and avers that "*the said goods and chattels*" were the property of the plaintiff, unless the plaintiff prove that the whole of the goods belong to him, the defendant will be entitled to a verdict ^g; but it seems that if part of the goods belong to the plaintiff, the judge will ask the jury to find specially ^h.

When an adverse claim is set up to goods seized by the sheriff, and the latter applies to the court for relief, and the adverse party does not appear to support his claim, the court will bar his claim as against the sheriff ^h. So, where the execution creditor does not

^a *Rex v. Sheriff of Hertfordshire*, 5 Dowl. Rep. 144. 2 Har. & W. 122. 12 Leg. Obs. 244, 5. S. C.

^b *Badcock v. Beauchamp*, 3 Leg. Obs. 66. 8 Bing. 86. S. C. cited. *Parker v. Booth*, 1 Moore & S. 156. 8 Bing. 85. S. C. *Northcote v. Beauchamp*, 1 Moore & S. 158. 8 Bing. 86. S. C. *Barker v. Dynes*, 1 Dowl. Rep. 169. 3 Leg. Obs. 310. S. C. *Slowman v. Back*, 3 Barn. & Ad. 103; and for the form of the rule, see *Parker v. Booth*, 1 Moore & S. 156. 8 Bing. 85. S. C. Append. to *Tidd Sup.*

1833, p. 322, &c.

^c *Ford v. Baynton*, 1 Dowl. Rep. 357. *Curlewis v. Pocock*, 5 Dowl. Rep. 381.

^d *Bramidge v. Adshead*, 2 Dowl. Rep. 59.

^e *Allen v. Gibbon*, 2 Dowl. Rep. 292.

^f *Bramidge v. Adshead*, 2 Dowl. Rep. 59. *Bentley v. Hook*, 4 Tyr. Rep. 229.

^g *Morewood v. Wilkes*, 6 Car. & P. 144.

^h *Bowdler v. Smith*, 1 Dowl. Rep. 417. 4 Leg. Obs. 187. S. C. *Perkins (or Perkins) v. Benton, (or Burton)*, 3 Tyr. Rep.

appear to support his execution, his claim may be barred, as against a third person claiming the goods ^a. But where an execution creditor does not appear, on being served with a sheriff's rule, the court cannot bar his claim, as between him and another execution creditor ^b. And if an execution creditor abandon his process against certain goods seized under a *feri facias*, in favour of the claimant, the sheriff has still a right to shew, in an action against him, that the goods were the property of the defendant ^c.

The costs of proceedings, under the interpleader act, are declared thereby to be in the discretion of the court; and in what manner this discretion has been exercised, will appear by the following decisions.

As the sheriff, previously to the above act, was not allowed his costs of applying to the court for enlarging the time to make his return ^d, so neither is he entitled by that act to his costs of the application for relief ^e. And the court will not, under the interpleader act, allow the sheriff his costs incurred by keeping possession, in consequence of a party refusing to consent to a judge at chambers making an order in the case; no authority for that purpose being given by the act ^f. But where a claimant abandons his claim after an application under the interpleader act, and after an issue directed by the court, the sheriff is entitled to his costs from the time of directing the issue, and of the application for those costs ^g. So, where an execution creditor appeared under the interpleader act, and consented, with the claimant, that the sheriff should sell the goods, and that their produce should abide the event of an

Costs of proceedings on interpleader act.

When allowed, or not, to sheriff

51. 2 Dowl. Rep. 108. 6 Leg. Obs. 478. S. C. *Towgood v. Morgan*, 3 Tyr. Rep. 52. (a.); and see *Field v. Cope*, 2 Tyr. Rep. 458. 2 Crompt. & J. 480. 1 Dowl. Rep. 567. S. C.

^a *Ford v. Dillon*, (or *Dilly*), 2 Nev. & M. 682. 5 Barn. & Ad. 885. S. C.

^b *Donniger v. Hinxman*, 2 Dowl. Rep. 424. 7 Leg. Obs. 252. S. C. *per Little-dale*, J.

^c *Baynton v. Harvey*, 3 Dowl. Rep. 844.

^d *Rex v. Cooke*, 1 M'Clel. & Y. 198, 9.; and see *Tidd Prac.* 9 Ed. 1017, 18. *Ante*, 574, 5.

^e *Badeock v. Beauchamp*, 3 Leg. Obs. 66. 8 Bing. 86. S. C. cited. *Parker v. Booth*, 1 Moore & S. 156. 8 Bing. 85. S. C. *Northcote (or Northcott) v. Beau-*

champ, 1 Moore & S. 158. 8 Bing. 86. S. C. *Barker v. Dynes*, 1 Dowl. Rep. 169. 3 Leg. Obs. 310. S. C. *Bowdler v. Smith*, 1 Dowl. Rep. 417. 4 Leg. Obs. 187. S. C. *Field v. Cope*, 2 Tyr. Rep. 458. 2 Crompt. & J. 480. 1 Dowl. Rep. 567. S. C. *Oram v. Sheldon*, 3 Dowl. Rep. 640. 1 Hodges, 92. S. C. *Armistage v. Foster*, 1 Har. & W. 206. *West v. Rotherham*, 3 Bing. N. R. 527. 2 Scott, 802. 1 Hodges, 461. S. C. *Beauwick v. Thomas*, 5 Dowl. Rep. 458.

^f *Clarke v. Chetwode*, 4 Dowl. Rep. 635. 11 Leg. Obs. 404, 5. S. C. *per Patteson*, J.

^g *Scales v. Sargeson*, 4 Dowl. Rep. 231. 11 Leg. Obs. 118, 19. S. C.; and see *Same v. Same*, 3 Dowl. Rep. 707. 10 Leg. Obs. 285. S. C.

issue to be tried, but subsequently abandoned his claim, the court compelled him to pay the sheriff the costs of selling the goods ^a. Where there had been great delay however, on the part of the sheriff, in applying to the court, in consequence of negotiations between the parties, and the execution creditor afterwards abandoned his claim, the court ordered each party to pay his own costs ^b.

Of appearance
by execution
creditor, &c.

An execution creditor, served with a sheriff's rule under the interpleader act, is not bound to appear, when there are no goods liable to his execution: and therefore, where such creditor appears upon the rule, but does not insist upon any goods being liable to his execution, he is not entitled to the costs of his appearance ^c. So, where the rule called upon assignees of a bankrupt, who had made a claim under a *fiat* in bankruptcy which was afterwards superseded, the court refused to make the sheriff pay the costs of the assignees' appearance ^d. But where the landlord of premises on which the goods were taken, has a claim for rent, and gives notice in proper time, the sheriff ought to pay him; otherwise the court will make the sheriff pay the landlord's costs of appearing ^e. So, where the court had ordered the sheriff to pay the rent, upon the landlord's giving security, and also to pay his costs, it was holden that the sheriff was liable to pay the expense of the security ^f.

When claim is
abandoned.

Where an issue is directed to be tried between an execution creditor and a claimant brought before the court by the sheriff under the interpleader act, but the latter refuses to try, and abandons his claim, he will be liable to pay the execution creditor's costs, down to the time of the claim being abandoned, and of applying to take the money paid in by the sheriff out of court ^g. So where, in consequence of a claim made to goods seized by a sheriff in execution, the court ordered the claimant to proceed to trial, upon paying a sum of money into court, which he neglected to do, and a rule was then obtained to compel him to pay the costs occasioned by his false claim, the court held that he was liable to pay those costs, as well as the costs of that rule, though no previous application had been made to him ^h. The

^a *Dabbs v. Humphrey, (or Humphries)*
1 *Hodges*, 4. 1 *Scott*, 325. 1 *Bing. N. R.*
412. 3 *Dowl. Rep.* 377. 9 *Leg. Obs.*
302. *S. C.*; and see *Underden v. Burgess*,
4 *Dowl. Rep.* 104. 10 *Leg. Obs.* 495.
S. C. *Armitage v. Foster*, 1 *Har. & W.*
208.

^b *Dixon v. Ensell*, 2 *Dowl. Rep.* 621.

^c *Glasier v. Cooke*, 5 *Nev. & M.* 680.

^d *Clarke v. Lord*, 2 *Dowl. Rep.* 55.

^e *Id. ib.*

^f *Same v. Same*, *id.* 227. 7 *Leg. Obs.*
525. *S. C.*

^g *Wills v. Hopkins*, 3 *Dowl. Rep.* 346.
9 *Leg. Obs.* 429. *S. C.*

^h *Scales v. Sargeson*, 3 *Dowl. Rep.*
707. 10 *Leg. Obs.* 285. *S. C.*; and see
Same v. Same, 4 *Dowl. Rep.* 231. 11
Leg. Obs. 118, 19, *S. C.*

affidavit in support of an application to the court for costs, when the claimant relinquishes his claim, must be entitled in the names of the parties in the original cause ^a. And the rule for paying a sum of money into the hands of the execution creditor, which is the produce of an execution, and which has been paid into court by the sheriff under the interpleader act, the claimant having abandoned his claim, is not absolute, but only a rule *nisi* in the first instance ^b.

Where an issue is tried by the direction of the court, the unsuccessful party is liable for the costs ^c: But the other party who applies to the court by motion, without having made application to the opposite party, to do what the rule requires of him, is not entitled to the costs of the rule, if the latter, on shewing cause, confine himself to the question of costs ^c. And where a sheriff is relieved under the interpleader act, and an issue is directed to try the rights of adverse claimants, the court may adjudicate after the trial, on the costs of appearing to the sheriff's rule, and of the issue ^d.

On trial of feigned issue.

When an adverse claim is set up to goods seized by the sheriff, and the latter applies to the court for relief, and the adverse party does not appear to support his claim, the court will make him pay the execution creditor his costs of appearing on the sheriff's rule ^e. And where a *feri facias* having issued, goods were seized under it, and an adverse claim being set up, the sheriff applied to the court for relief, and the execution creditor did not appear to support his *feri facias*, the court granted the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor, but not those of the sheriff ^f: If the execution creditor, however, afterwards appear, and open the rule, the court will grant the sheriff the costs of his second appearance ^f. Where a claim to goods seized by a sheriff

On non-appearance of parties.

^a *Elliot v. Sparrow*, 1 Har. & W. 370.

& K. 365.

^b *Stanley (or Staley) v. Perry*, 4 Dowl. Rep. 599. 1 Har. & W. 669. 11 Leg. Obs. 230. 325. S. C. *per Patteson, J.*; and see *Shuttleworth v. Clark*, 1 Har. & W. 662. 4 Dowl. Rep. 561. 11 Leg. Obs. 373, 4. S. C. *per Coleridge, J.*

^c *Bowdler v. Smith*, 1 Dowl. Rep. 417. 4 Leg. Obs. 187. S. C. *Perkins (or Parkins) v. Benton (or Burton)*, 3 Tyr. Rep. 51. 2 Dowl. Rep. 106. 6 Leg. Obs. 476. S. C.

^c *Bowen v. Bramidge*, 2 Dowl. Rep. 213. *Armitage v. Foster*, 1 Har. & W. 208; and see *Matthews v. Sims, (or Sill)*, 5 Dowl. Rep. 234. 13 Leg. Obs. 189. S. C.

^f *Bryant v. Ikey*, 1 Dowl. Rep. 428. 4 Leg. Obs. 284. S. C. *per Patteson, J.* *Tomlinson v. Done*, 1 Har. & W. 123. *per Patteson, J.* *Ford v. Dilly, (or Dillon)*, 5 Barn. & Ad. 885. 2 Nev. & M. 662. S. C. *Beswick v. Thomas*, 5 Dowl. Rep. 458; and see *Field v. Cope*, 2 Tyr. Rep. 458. 2 Crompt. & J. 480. 1 Dowl. Rep. 567. S. C.

^d *Seaward v. Williams*, 1 Dowl. Rep. 528. 5 Leg. Obs. 427. S. C. *per Parke, J.*; and see *Levy v. Champneys*, 4 Ad.

was made by the defendant, on behalf of another, which did not appear to be well founded, and neither party appeared to support the claim, the court of Exchequer made the defendant pay the costs of the sheriff's application under the interpleader act^a. But in a subsequent case^b, the court of Common Pleas would not allow the sheriff applying to be relieved under the act his costs, where the claimant did not appear; nor will the execution creditor be allowed his costs, except in the event of extremely improper conduct in the parties^c. And where the sheriff applies to the court for relief under the interpleader act, and no blame appears to attach either to the execution creditor, the claimant, or the sheriff, each party will pay his own costs^d. In a late case^e, where upon a rule of interpleader obtained on behalf of the sheriff, neither the execution creditor nor the claimant appeared, after service of the rule, the court ordered so much of the goods to be sold as would satisfy the sheriff's poundage and expenses, and the rest to be abandoned. The sheriff's right to *poundage* depends upon the event of the suit: and if that be determined in favour of the execution creditor, the sheriff will of course be entitled to his poundage; but otherwise not^f.

Sheriff's poundage.

Rules and orders, &c. may be entered of record, and made evidence.

Force and effect of rule or order.

Execution for costs.

To give effect to the provisions of the interpleader act, it is thereby enacted, that "all rules, orders, matters, and decisions, to be made and done in pursuance of that act, except only the *affidavits* "to be filed, may, together with the declaration in the cause, (if any,) "be entered of record^g, with a note in the margin, expressing the "true date of such entry, to the end that the same may be evidence "in future times, if required, and to secure and enforce the payment "of costs directed by any such rule or order; and every such rule or "order, so entered, shall have the force and effect of a judgment, "except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within *fifteen* days

^a *Lewis v. Kicke*, 2 Dowl. Rep. 387. 2 Crompt. & M. 331. 4 Tyr. Rep. 157. S. C.; and see *Philby v. Ikey*, 2 Dowl. Rep. 222. 7 Leg. Obs. 508. S. C. *Towgood v. Morgan*, 3 Tyr. Rep. 52. (a.)

^b *Oram v. Sheldon*, 3 Dowl. Rep. 640. 1 Hodges, 93. S. C. *Thompson v. Sheldon*, 1 Scott, 697. S. C.; and see *West v. Rotherham*, 2 Bing. N. R. 527. 2 Scott, 302. 1 Hodges, 461. S. C. *Beswick v. Thomas*, 5 Dowl. Rep. 458. 13 Leg. Obs. 302. S. C. *per* *Ld. Abinger*, Ch. B.

^c *Id. ib.*

^d *Morland v. Chitty*, 1 Dowl. Rep. 520. 5 Leg. Obs. 428. S. C.

^e *Eveling v. Salisbury*, 3 Bing. N. R. 299. 5 Dowl. Rep. 369. S. C. This is the first case of the kind, in any of the courts; 3 Bing. N. R. 299. (a) and is the last reported decision on the subject of costs of proceedings on the interpleader act.

^f *Barker v. Dynes*, 1 Dowl. Rep. 169. 3 Leg. Obs. 310. S. C.

^g *Append. to Tidd Sup.* 1833, p. 325, 6.

" after notice of the taxation and amount thereof given to the party
 " ordered to pay the same, his agent or attorney, execution may issue
 " for the same, by *feri facias*^a, or *capias ad satisfaciendum*^b, adapted
 " to the case, together with the costs of such entry, and of the execu-
 " tion, if by *feri facias*; and such writ and writs may bear *teste* on the
 " day of issuing the same, whether in term or vacation; and the she- Sheriff's fees on.
 " riff, or other officer, executing any such writ, shall be entitled to
 " the same fees, and no more, as upon any similar writ grounded upon
 " a judgment of the court."^c The court, however, has no power by
 this statute, to order rules made under it to be entered up, otherwise
 than as pointed out in the seventh section, *viz.* according to their true
 date^d.

^a Append. to Tidd *Sup.* 1883, p. 387. see Tidd *Prac.* 9 Ed. 1089.

^b *Id. ib.*

^d *Lambirth v. Barrington*, 4 Dowl.

^c Stat. 1 & 2 W. IV. c. 58. § 7; and Rep. 126. 2 Bing. N. R. 149. 2 Scott,
as to the sheriff's fees on an execution, 263. 1 Hodges, 205. S. C.

CHAP. XLII.

Of WRITS of EXTENT, and PROCEEDINGS thereon.

WRITS of extent, and the proceedings thereon, are not materially altered or affected by any of the late statutes, or rules of court. It may not, however, be improper to notice in this Chapter, some of the more recent decisions of the courts respecting them.

Immediate extent, when it lies, and when not.

An immediate extent lies against the insolvent agent of a fire insurance company, where it is found on inquisition, that he has received a sum due to the crown for insurance duties, although he has given a bond to the fire office, to account for all monies received by him in his capacity of agent, and though the company be also liable to the crown ^a. But a plaintiff having recovered damages for a libel, against the proprietor of a newspaper, is not entitled to an extent against the principal and sureties in the recognizance, given by them to secure the payment of penalties under the 11 Geo. IV. & 1 W. IV. c. 73. § 3. merely by getting a return of *nulla bona* to a *feri facias*, issued against the principal; but he must convince the court by *affidavit*, that every exertion has been made to obtain satisfaction of the defendant ^b. The court, in one case, refused to grant a *fiat* for an extent, on an application made by a committee of a lunatic against a preceding committee, on the usual bond to the crown, where he had been declared a bankrupt, under a commission of bankruptcy issued against him *ten* years before the application; saying that the only proper course of proceeding was by *scire facias* ^c: And in a subsequent case it was doubted, whether a bond to the crown, entered into by the committee of a lunatic, in consequence of a grant of the lunatic's estate having been made to him, in the

^a *Rex v. Wrangham*, 1 Tyr. Rep. 383. 1 Crompt. & J. 408. 2 Leg. Obs. 93, 4. S. C. And see further, as to the writ of extent in general, when it lies, and when not, Todd Prac. 9 Ed. 1043; as to writs of extent in *chief* and in *aid*, *id.* 1045, &c. 1059, &c.; and as to the proceedings thereon, to enforce payment of the debt due to

the crown, or its debtor, *id.* 1068, &c.; and the means of resisting such proceedings, either by the defendant or a third person, *id.* 1072, &c.

^b *Pennell (or Bennett) v. Thompson*, 1 Crompt. & M. 857. 3 Tyr. Rep. 823. 2 Dowl. Rep. 137. S. C.

^c In the matter of *Lacy*, 10 Price, 185.

usual form, under the great seal, be an obligation of the same force and effect as a statute staple, within the 33 Hen. VIII. c. 39. § 50^a. Bonds entered into by receivers-general of the assessed taxes, and their sureties, are required to be made to the *king*, his *heirs* and *successors*, by the statute 3 Geo. IV. c. 88. No. 1. of rules and regulations, art. 8. But bonds entered into by collectors of assessed taxes, and their sureties, need not be so made; but may be given to the commissioners, by the statute 43 Geo. III. c. 99. § 13^b.

The statute 57 Geo. III. c. 117. or the rule of court respecting extents in aid, does not apply to extents in chief in the *second* degree: Therefore, the crown may proceed by extent, to recover a debt due from a person indebted to the crown debtor, (a collector of taxes, who has received and misapplied the crown money,) although he be not a debtor to the crown, within the *fourth* section of the above statute: and it is not necessary, in the *affidavit* made for obtaining a baron's *fiat* for such an extent, that there should be any averment of the insolvency of the crown debtor, or any facts stated from which it may be inferred; nor is it necessary, in such a case, that collusion should be negatived^c. And a crown debtor, who has issued prerogative process against his own debtor, is not entitled to continue proceedings thereon, after he has paid his debt to the crown, and after the defendant has obtained the benefit of the insolvent act, and been thereby discharged from the debt due to the crown debtor^d.

Extent in second degree.

In aid.

Fixtures demised with a paper-mill, and used by the tenant in the manufacture of paper, are not liable to be seized under an extent, for duties upon paper owing by the tenant to the crown, as utensils for the making of paper in the custody of the tenant, under the 34 Geo. III. c. 20. § 27^e. And it has been doubted, whether printed calicoes, the property of third persons, in the hands of the printer, are liable to seizure under an extent, for duties in respect of those goods, due from the printer, by virtue of the statute 28 Geo. III. c. 37. § 21^f. The lien of the crown however, for duties in arrear, attaches on the subject matter in respect of which they are made to arise, by the statutes imposing them, although process do not issue till after the assignment of it, as part of the estate of the crown debtor.

What may, or may not, be taken under extent.

^a Rex v. Lamb, M'Clel. 450. 13 Price, 649. S. C. Dowl. Rep. 128. 1 Crompt. & M. 862. 3 Tyr. Rep. 938. S. C.

^b Collins v. Gwynne, 9 Bing. 544. 557, ^c Attorney-general v. Gibbs, 3 Younge & J. 333.

^d 2 Moore & S. 640. 665, 6. S. C. ^e Rex v. Tregoning, 2 Younge & J.

^f Rex v. Bell, 11 Price, 772. 132; and see Rex v. Dale, 18 Price, 739.

^d Rex, in aid of Hollis v. Bingham, 2

or to the provisional assignee, under the statutes of bankruptcy, upon the construction of the statute 3 Geo. IV. c. 95. § 10^a.

Proceedings on writ of *venditioni exponas*, &c.

Where an interest in premises leased for lives, and for a further term of years after the decease of the survivor, had been extended, and sold by the sheriff, under a writ of *venditioni exponas*, but no order of court had been obtained for the sale, under the statute 25 Geo. III. c. 35, the court refused to confirm the sale, and order the remembrancer to execute a conveyance to the purchaser^b. A sheriff cannot retain against the crown, a sum of money deposited by an agent of the crown, to cover the expenses of a sale by auction of property seized under an extent, and sold under a *venditioni exponas*^c. The court will not set aside any part of a record on motion, nor order a replication to a plea to an extent to be struck out, because not consistent with, or at least not pursuing the facts stated in the *affidavit*, on which the fiat was granted^d. And in *scire facias* upon a recognizance entered into to abide by an award, respecting matters in difference upon an extent in aid, it has been holden that the defendant, having succeeded upon demurrer, is not entitled to costs^e.

Setting aside extent on motion, &c.

Costs.

^a Rex v. Dale, 13 Price, 739.

10 Price, 46.

^b Rex v. Blunt, 2 Younge & J. 120.

^c Rex v. Bingham, 1 Crompt. & J. 379.

^e Rex v. Jones, 1 Crompt. & J. 140.

^d 1 Tyr. Rep. 262. 1 Dowl. Rep. 280.

^e Rex, in aid of Troughton, v. Burbery, S. C.

CHAP. XLIII.

Of WRITS of SCIRE FACIAS, and PROCEEDINGS thereon.

THE writ of *scire facias*, we have seen, is not affected by the uniformity of process act^a; and may be sued out to revive a judgment, after a lapse of time, or change of parties, &c. or to obtain execution against bail on their recognizance.

Scire facias, writ of, and when it may be sued out.

The writ of *scire facias* to revive a judgment, after a year and a day, may be sued out of course at any time within *seven* years from the date of the judgment, without application to the court^b: but if it be above *seven* and under *ten* years old, a side bar or treasury rule must be obtained for that purpose, from the clerk of the rules in the King's Bench^c, or secondary in the Common Pleas^d. If it were above *ten* years old, there must formerly have been a motion to the court, in the King's Bench^e, supported by an *affidavit* of the debt being due, the judgment unsatisfied, and the defendant living; upon which the rule was absolute in the first instance, unless the judgment were of more than *twenty* years' standing, and then there must have been a rule to shew cause^f. Afterwards, if the judgment were above *ten* and under *fifteen* years old, the rule was absolute in the first instance, on an *affidavit* of the debt being due, &c.; and might have been drawn up on a motion paper signed by counsel: If it were above *fifteen* years old, there must have been a rule to shew cause^g. In the Common Pleas, when the judgment was more than *ten* years old, the court must have been moved in term time, for leave to issue a *scire facias* to revive it; and would order that no execution should be taken out thereon, without a return of *scire feci*, or an *affidavit* of personal notice to the defendant^h; and if the judgment were above

To revive an old judgment.

^a 2 W. IV. c. 39. *Ante*, 60, 61.

^b Imp. K. B. 10 Ed. 463. Imp. C. P. 6 Ed. 466.

^c Hardisty v. Barny, 2 Salk. 598.

^d Imp. C. P. 6 Ed. 466.

^e Hardisty v. Barny, 2 Salk. 598. Sty. P. R. 575. Ed. 1707. 2 Lil. P. R. 499. Ed. 1719. 1 Inst. Cler. 152.

^f Blakely v. Vincent, T. 36 Geo. III. Waters v. Hales, E. 37 Geo. III. K. B. Doe d. Reynell v. Tuckett, 2 Barn. & Ald. 778. 1 Chit. R. 535. S. C. Sloman v. Gregory, 1 Dowl. & R. 181.

^g Bagnall v. Gray, 2 Blac. Rep. 1140; and see Lowe v. Robins, 3 Moore, 757. 1 Brod. & B. 381. S. C.

twenty years old, there must have been a rule to shew cause ^a. But, by a general rule of all the courts ^b, "a *scire facias* to revive a judgment more than *ten* years old, shall not be allowed, without a motion for that purpose in term, or a judge's order in vacation; nor, if more than *fifteen*, without a rule to shew cause."

Decisions
thereon.

The *affidavit* required by the above rule, of the existence of the debt, to obtain a *scire facias* to revive a judgment more than *ten* years old, ought, if not made by the plaintiff, to be made by the person who was his attorney when the judgment was obtained ^c. In *scire facias* by executors, to revive a judgment obtained by the testator, all who are named executors in the will may join, though one only has proved ^d. And, in the Exchequer, a rule moved on the 8 & 9 W. III. c. 11. § 6. against executors, for a *scire facias* to shew cause why damages should not be assessed and recovered on an interlocutory judgment signed more than *twenty* years before, against the defendant his testator, who had since died, is a rule *nisi* only ^e; which rule must be served on all the executors who have proved the will ^f: And where a rule is served, by leaving a copy with a servant, inquiry should be subsequently made of the servant, whether the master has received the copy ^g. On a motion to revive a judgment by *scire facias*, the validity of the judgment cannot be impeached, for the purpose of opposing that motion; but a separate application must be made, to set aside the judgment ^h.

Scire facias,
where brought,
on recognizance
of bail.

A *scire facias* on a recognizance of bail in the action, being an original proceeding, must, in the King's Bench, be brought in *Middlesex*, where the record is; for recognizances in this court are not obligatory by the caption, as in the Common Pleas, but by being entered of record ^h: But, in the case of a recognizance entered into by bail on a writ of error, if it were entered as taken at a judge's chambers in *Serjeants' Inn*, the *scire facias* might have been sued out in *London* ⁱ;

^a 2 Sel. Pr. 2 Ed. 196; and see *Coysgarne v. Fly*, 2 Blac. Rep. 995. Tidd Prac. 9 Ed. 484, 5, 6, 7. 485. (m.) 1106, 6.

^b R. H. 2 W. LV. reg. I. § 79. 3 Barn. & Ad. 385. 8 Bing. 300. 2 Crompt. & J. 190.

^c *Duke of Norfolk v. Leicester*, (or Spencer,) 1 Meeson & W. 204. 1 Tyr. & G. 249. 4 Dowl. Rep. 746. S. C.

^d *Scott v. Briant*, 6 Nev. & M. 381. 2 Har. & W. 54. S. C.

^e *Brown v. Evans*, 2 Tyr. Rep. 389.

^f *Panter v. Seaman*, 5 Nev. & M. 679.

^g *Thomas v. Williams*, 3 Dowl. Rep. 655. 10 Leg. Obs. 158. S. C.

^h *Shuttle (or Chetley) v. Wood*, 2 Salk. 564. 600. 659. 6 Mod. 42. Anon. *id.* 132. Anon. 7 Mod. 120, 21. R. E. 5 Geo. II. reg. III. (a.) *K. B. Sheepshanks v. Lucas*, 1 Bur. 409. *Coxeter v. Burke*, 5 East, 461. 2 Smith R. 14. S. C.

ⁱ *Palmer v. Byfield*, 8 Mod. 290. R. E. 5 Geo. II. reg. III. (a.) *K. B. Lil. Ent.* 520.

and, in the Common Pleas, upon a recognizance taken in *Serjeant's Inn*, or before a commissioner in the country, and recorded at *Westminster*, the *scire facias* might have been brought in *London*, or in the county where the recognizance was taken, or in *Middlesex*^a. But, by a general rule of all the courts^b, "a *scire facias* upon a recognizance taken in *Serjeant's Inn*, or before a commissioner in the country, and recorded at *Westminster*, shall be brought in *Middlesex* only; and the form of the recognizance shall not express where it was taken." It should also be remembered, that by the law amendment act^c, "all actions of *debt*, or *scire facias*, upon any recognizance, shall be commenced and sued within *ten* years after the end of the then present session, or within *twenty* years after the cause of such actions or suits, but not after."

When the sheriff returned *nihil* to a *scire facias*, the plaintiff, in the King's Bench, must in all cases have sued out a second, or *alias* writ of *scire facias*^d, commanding the sheriff, as *before* he was commanded, &c.; and if, upon this second writ, the sheriff also returned *nihil*, and the bail or defendant did not appear, judgment was formerly given against them^e: two *nihils* being deemed equivalent to a *scire feci*^f: and it was not necessary to give notice of *scire facias*'s, to the bail; it being their duty to watch the sheriff's office, where they were lodged^g: In the Common Pleas, if a *scire facias* issued upon a judgment, for debt and damages, against the defendant himself, who was party and privy to the judgment, and the sheriff returned *nihil*, and the defendant made default, judgment was given against him, without awarding a second *scire facias*^h: But now, by a general rule of all

Judgment how signed, for non-appearance to *scire facias*.

^a *Hall v. Winckfield*, (*Winkfield*, or *Wingfield*.) *Hob.* 195. *Brownl.* 69. *Mo.* 883. *S. C.* *Andrew's case*, *Sty. Rep.* 9. *Andrews v. Harborn*, *Aleyn.* 12. *S. C.* *Redman v. Idle*, 2 *Lutw.* 1287. *Cock v. Green*, *Cas. Pr. C. P.* 31. *Follett v. Trill*, *Barnes*, 96, 7. *Pickering v. Thomson*, *id.* 207. *Kenny v. Thornton*, 2 *Blac. Rep.* 768. *Hartley v. Hodson*, 2 *Moore*, 66. 8 *Taunt.* 171. *S. C.*; and see *Tidd Prac.* 9 *Ed.* 1122.

^b *R. H.* 2 *W. IV. reg. I.* § 60. 3 *Barn. & Ad.* 386. 8 *Bing.* 300. 2 *Crompt. & J.* 190, 91.

^c 3 & 4 *W. IV. c.* 42. § 3. *Ante*, 4, 5.

^d 2 *Inst.* 472. *Randal v. Wale*, *Cro.*

Jac. 59. *Andrews v. Harper*, 8 *Mod.* 227. *Grubb v. Smithers*, *Say. Rep.* 121.

^e *Barret v. Cleydon*, *Dyer*, 168. *Ratcliff's case*, *id.* 172. *Rex v. Eaton*, *id.* 198. *Chevin v. Paramour*, *id.* 201. *Bromley v. Littleton*, *Yelv.* 112. *Barcock v. Tompson*, *Sty. Rep.* 281. 288. 323.

^f *Clarke v. Bradshaw*, 1 *East*, 89. *Hayward v. Ribbans*, 4 *East*, 312.

^g *Sillitoe v. Wallace and another*, bail of *Cawthorne*, *M.* 43 *Geo. III.* *K. B.* *Smith v. Crane*, 8 *Moore*, 8.

^h *Barret v. Cleydon*, *Dyer*, 168. *a.* 2 *Inst.* 472. *Anon.* 2 *Salk.* 599. *Com. Dig.* tit. *Pleader*, 3 *L.* 8.; and see *Tidd Prac.* 9 *Ed.* 1124, 5.

the courts^a, "no judgment shall be signed, for non-appearance to a *scire facias*, without leave of the court or a judge^b, unless the defendant has been summoned; but such judgment may be signed by leave, after *eight* days from the return of one *scire facias*."

Decisions there-
on

The above rule applies to proceedings by *scire facias* against the defendant, to revive the judgment, as well as against bail on their recognizance^c. And though the *scire facias*'s on a judgment had been issued previously thereto, it was holden that judgment could not be signed on such *scire facias*'s, without complying therewith^d: giving a rule for appearance was not deemed sufficient. And where several attempts had been made to summon a defendant, on a *scire facias* returnable on the 28th day of *April*, and *eight* days had elapsed after the return of the writ, an application on the 5th of *November*, to sign judgment, was holden to be too late, without summoning the defendant again^e. But where, on moving for judgment on a *scire facias*, it appeared that the defendant was out of the country, but notice had been given at his last place of abode, and several efforts made to serve him without effect, a rule was granted^f. The court will not allow judgment to be signed on the above rule, for non appearance to a *scire facias* against bail, unless it be shewn that they have been summoned, (in which case no application for leave to sign judgment is necessary^g), or that efforts have been made to summon them, and what those efforts were^h. So, judgment cannot be signed on a *scire facias* against bail resident out of the county of *Middlesex*, unless they have received notice of the proceedings, or attempts have been made to give such noticeⁱ: and the court will not give leave to sign judgment on a summons of one bail in *Middlesex*, unless the other, being resident out of that county, is warned of the proceeding^k.

^a R. H. 2 W. IV. reg. I. § 81. 3 Barn. & Ad. 386. 8 Bing. 300. 2 Cramp. & J. 191.

^b For the form of an *affidavit* to obtain leave to sign judgment, where the defendant has not been summoned, on two *scire facias*'s on a judgment, see Chit. Pr. *Addenda* 24, 5; and for the like, on two *scire facias*'s against bail, *id.* 25, 6.

^c Jackson v. Elam, 1 Dowl. Rep. 515. 5 Leg. Obs. 431, 2. S. C. per Littledale, J.

^d Kennedy v. Ld. Oxford, 1 Dowl. Rep. 613. 5 Leg. Obs. 242. S. C. per Bayley, B.

^e Wood v. Mosely, 1 Dowl. Rep. 513.

5 Leg. Obs. 128. S. C. per Littledale, J.

^f Bartrum v. Solyma, 7 Leg. Obs. 236. per Patterson, J. Weatherhead v. Landles, 5 Dowl. Rep. 189. 3 Scott, 406. S. C.

^g Curlewis v. Harris, 13 Leg. Obs. 377, 8.

^h Higgins v. Wilkes, 1 Dowl. Rep. 447. 5 Leg. Obs. 13. S. C. per Patterson, J. Sabine v. Field, 1 Cramp. & M. 466. 3 Tyr. Rep. 388. S. C.

ⁱ Wimall v. Cook, (or Winnall v. Cock,) 2 Dowl. Rep. 173. 6 Leg. Obs. 414. S. C.

^k Newton v. Maxwell, 2 Cramp. & J. 635.

The appearance of the bail or defendant, to a *scire facias* in the King's Bench, if the action were by *bill*, was signified by delivering a note in writing to the plaintiff's attorney: If the action were by *original*, an appearance should formerly have been entered with the *filacer*^a, or, in the Common Pleas, with the prothonotaries^b: But, by a general rule of all the courts^c, "a notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance, by the bail or defendant, on a *scire facias*."

Appearance by bail, or defendant, to *scire facias*.

No *damages* were recoverable in *scire facias*, at common law, for delay of execution^d: and the parties were consequently not entitled to *costs*^e, until the statute 8 & 9 W. III. c. 11. § 3. by which it is enacted, that "in all suits upon any writ or writs of *scire facias*, the plaintiff obtaining an award of execution after plea pleaded, or demurrer joined therein, shall recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias*, or *elegit*;" with a *proviso*, that the statute shall not extend to executors or administrators^f. This statute was extended by the law amendment act^g; by which it is enacted, that "in all writs of *scire facias*, the plaintiff obtaining judgment, on^h an award of execution, shall recover his costs of suit, upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined." And costs are it seems recoverable, when a *scire facias* is brought on the statute 8 & 9 W. III. c. 11. § 6, for assessing damages upon the death of a plaintiff or defendant, after interlocutory and before final judgmentⁱ; or, on the same statute, § 8. for assessing further damages, on a suggestion of other breaches, in *debt* on bond for the performance of covenants^k, &c.

Damages, and costs in *scire facias*.

In the King's Bench, the plaintiff must formerly have paid costs, on quashing his own writ of *scire facias*, after the defendant had appeared thereto^l: In the Common Pleas, the plaintiff might have moved to quash his own writ, without paying costs, at any time before

Costs, on plaintiff's quashing his own writ.

^a 2 Archb. K. B. 89.

^b Imp. C. P. 7 Ed. 502. 515, 520.

^c R. H. 2 W. IV. reg. I. § 82. 3 Barn. & Ad. 386. 8 Bing. 300. 2 Crompt. & J. 191.

^d Knox v. Costello, 3 Bur. 1791; and see Tidd Prac. 9 Ed. 881. 946.

^e Tidd Prac. 9 Ed. 1132.

^f Bellew v. Aylmer, 1 Str. 188. Scammell v. Wilkinson, 3 East, 202. And for

determinations on this statute, see Tidd Prac. 9 Ed. 947.

^g 3 & 4 W. IV. c. 42. § 34.

^h Sic in printed copy of act, instead of *or*.

ⁱ Tidd Prac. 9 Ed. 947. 1132.

^k Id. 881. 947.

^l Pickman v. Robson, 1 Barn. & Ald. 486; and see Pocklington v. Peck, 1 Str. 688.

the defendant had pleaded ^a: But now, by a general rule of all the courts ^b, "a plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs." And the court of King's Bench will not make a rule for quashing a writ of *scire facias*, applied for by the plaintiff after the defendant has appeared, absolute in the first instance, unless good grounds are shewn ^c.

^a Heney v. Whitehead, Pr. Reg. 378. & Ad. 385. 8 Bing. 300. 2 Cramp. & J. 190.
Poole v. Broadfield, *id.* 379. Cas. Pr. C. P. 109. Barnes, 461. S. C.; and see

Tidd *Prac.* 9 Ed. 947, 8. 1123. ^b Ade v. Stubbs, 4 Dowl. Rep. 232. 1 Har. & W. 520. 14 Leg. Obs. 62, 3.

^c R. H. 2 W. IV. reg. I. § 78. 3 Barn. 117. S. C.

CHAP. XLIV.

Of WRITS of ERROR, and the PROCEEDINGS thereon.

A WRIT of error is an original writ, issuing out of Chancery; and lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit, in a court of record^a; and is in nature of a commission to the judges of the same or a superior court, by which they are authorized to examine the record upon which judgment was given, and on such examination to affirm or reverse the same according to law^b. This writ is grantable *ex debito justitiæ* in all cases, except in treason or felony^c; and in general lies for some error or defect in substance, that is not aided, amendable, or cured at common law, or by some of the statutes of amendment or jeofails^d: and it lies to the *same* court in which the judgment was given, or to which the record was removed by writ of error, or to a superior court. If a judgment in the King's Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the *same* court, by writ of error *coram nobis*, or *quæ coram nobis resident*^e, so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgment: for error in fact is not the error of the judges, and reversing it is not reversing their own judgment^f. So, upon a judgment in the King's Bench, if there be error in the *process*, or

Writ of error what, and when it lies.

For what cause.

To same or superior court.

Error *coram nobis*, in K. B. for error in fact.

For error in process.

^a Co. Lit. 288. b. And for the proceedings in general on writs of error, see 2 Wms. Saund. 5 Ed. 100. (1.) to 101. x.

^b 2 Bac. Abr. 187. Cooper v. Ginger, 1 Str. 607. 2 Ld. Raym. 1403. S. C. Street v. Hopkinson, Cas. temp. Hardw. 346; and see Tidd Prac. 9 Ed. 1134.

^c Regina v. Paty, 2 Salk. 504. Christie v. Richardson, 3 Durnf. & E. 78. Bleas-

dale v. Darby, 9 Price, 606.

^d Tidd Prac. 9 Ed. 918, &c. 1136.

^e Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 2, 3, 4.

^f 1 Rol. Abr. 747. pl. 13, 14. Meggot v. Broughton, Cro. Eliz. 105, 6. Roy v. Cornwall, 1 Sid. 208. Knoll's case, 3 Salk. 145, 6. Anon. *id.* 147; and see Steph. Pl. 139, 40.

through the default of the clerks, it may be reversed in the same court, by writ of error *coram nobis*^a: and error will lie in the King's Bench, on a judgment of the Common Pleas, for error in fact^b. But if an erroneous judgment be given in the King's Bench, and the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court, upon such judgment^c. If an infant by attorney assign for error *coram nobis*, that he has improperly appeared in the action by attorney, instead of by guardian, it is not a mere irregularity, but a ground of error: the court however will, on application, set aside the assignment, and allow the plaintiff in error to assign the error by guardian^d. In the Common Pleas, the record and process being stated to remain before the king's justices, the writ is called a writ of error *coram vobis*, or *quæ coram vobis resident*^e.

Error *coram vobis*, in C. P.

For error in law, to K. B. from C. P. and inferior courts.

For the error or mistake of the judges in point of law, a writ of error formerly lay to the King's Bench, from the Common Pleas at Westminster^f; as it still lies from all inferior courts of record in England^g, except in London^h, and some other places; and, after judgment given thereon, a second writ of error may be brought, returnable in the House of Lords: but error lies not from an inferior court to the Common Pleasⁱ.

From K. B. at common law.

At common law, no writ of error lay on a judgment from the King's Bench, except in parliament; by which means the subject was often disappointed of his writ of error, either by the not sitting of parliament, or by their being employed in public business, when they did sit^k. To remedy which, it was enacted, by the statute 27 Eliz. c. 8. that "where any judgment shall be given in the King's Bench, in any "action of *debt, detinue, covenant, account, action upon the case, ejectment, or trespass, first commenced there*, other than such only where "the Queen shall be party, the plaintiff or defendant, against whom "such judgment shall be given, may, at his election^l, sue out of the

To Exchequer chamber, by stat. 27 Eliz. c. 8.

^a 1 Rol. Abr. 746. F. N. B. 21. I. Mayor, &c. of Maidstone's case, Poph. 181.

^b Castledine v. Mundy, 4 Barn. & Ad. 90. 1 Nev. & M. 635. S. C.; and see Bird v. Orms, Cro. Jac. 289. Frescobaldi v. Kinaston, 2 Str. 784.

^c 1 Rol. Abr. 746; and see Tidd Prac. 9 Ed. 1136, 7.

^d Beven v. Cheshire, 3 Dowl. Rep. 70.

^e Append. to Tidd Prac. Chap. XLIV. § 5, 6; and see further as to writs of error *coram vobis*, and whether they may be brought for error in fact in the Common

Pleas, Palm. Prac. Dom. Proc. 119. 131, 2. 363, 4. 367.

^f 4 Inst. 22.

^g Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 7.

^h Ballard v. Bennet, 2 Bur. 777.

ⁱ Finch L. 480. Ap-Richarde v. Jones, Dyer, 250. Roe v. Hartly, Cro. Eliz. 26. 3 Blac. Com. 410; and see Tidd Prac. 9 Ed. 1137, 8.

^k 2 Bac. Abr. 212; and see Tidd Prac. 9 Ed. 1138.

^l Anon. 3 Salk. 147.

" court of Chancery, a special writ of error, directed to the chief justice of the King's Bench, commanding him to cause the record, and all things concerning the judgment, to be brought before the justices of the common bench, and barons of the Exchequer, into the Exchequer chamber, there to be examined by the said justices and barons; which said justices, and such barons as are of the degree of the coif, or six of them, shall have full power and authority to examine all such errors as shall be assigned in or upon any such judgment, and thereupon to reverse or affirm the same as the law shall require, other than for errors concerning the jurisdiction of the court of King's Bench, or for want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever; and after the said judgment shall be affirmed or reversed, the said record, and all things concerning the same, shall be brought back into the King's Bench, that further proceeding may be had thereupon, as well for execution as otherwise: but such reversal or affirmation shall not be so final, but that the party grieved shall and may sue in the high court of parliament, for the further and due examination of the said judgment, as was then usual upon erroneous judgments in the court of King's Bench."

This statute is confined to the particular actions enumerated therein^a. And a writ of error did not formerly lie in the Exchequer chamber, upon a judgment of the King's Bench, in an action commenced by *original writ*; because it was not *first commenced* in the King's Bench, but was founded upon the original writ issuing out of Chancery^b. And for a similar reason, a writ of error lay not in the Exchequer chamber, upon a judgment affirmed on error in the King's Bench, but must have been brought in the House of Lords^c. So, where a judgment in the King's Bench was affirmed in the Exchequer chamber, upon which the plaintiff sued out a *scire facias* in the King's Bench, and had an award of execution, and afterwards the defendant brought a writ of error in the Exchequer chamber, *tam in re-ditione judicii, quam in adjudicatione executionis*, the court held that this writ of error did not lie, and was no *supersedeas* of execution^d: But notwithstanding that part of the statute which exempts actions where the Queen shall be party, it was holden that a writ of error lay in the Exchequer chamber, upon a judgment in an action of debt *qui tam*, upon the statute of usury^e.

On judgment in actions commenced by original writ.

^a Tidd *Prac.* 9 Ed. 1139.

264.

^b *Id.* 102; and see 1 Wms. Saund. 5 Ed. 346. f. (4.)

^d Hartop v. Holt, 1 Salk. 263. 1 Ld. Raym. 97. 5 Mod. 228. S. C.

^c Heydon v. Godsole, 2 Bulst. 162; and see Harvey v. Williams, 1 Rol. Rep.

^e Lloyd v. Skutt, Doug. 350; and see Tidd *Prac.* 9 Ed. 1139.

From law side of
Exchequer, in
England.

From proceedings on the *law* side of the Exchequer in *England*, a writ of error lay into the court of Exchequer chamber, before the lord chancellor, lord treasurer, and judges of the courts of King's Bench and Common Pleas^a; and thence it lay to the House of Lords^b: but against decrees on the *equity* side of the Exchequer, the appeal was to the House of Lords in the first instance.

From courts in
Scotland.

Before the union with *Scotland*, a writ of error lay not in this country, upon any judgment in *Scotland*, because it was a distinct kingdom, and governed by distinct laws^c: but it is since given by statute^d, from the court of Exchequer in *Scotland*, returnable in parliament^e. From the decision of the court of session in *Scotland*, on a bill of exceptions, as to the competency of witnesses, the admissibility of evidence, or other matter of law, arising at the trial of a cause in the jury court, the appeal is to the House of Lords, by the statutes 55 Geo. III. c. 42. § 7. 59 Geo. III. c. 35. § 17. and 6 Geo. IV. c. 120. § 25, 6 f.

In *Ireland*.

A writ of error formerly lay from the King's Bench in *Ireland* to the King's Bench in *England*, and thence to the House of Lords:

By stat. 23 Geo.
III. c. 28. § 2.

But, by the statute 23 Geo. III. c. 28. § 2. "no writ of error or appeal shall be received or adjudged, or any other proceedings had by "or in any of his Majesty's courts in this kingdom, in any action or "suit at law or in equity, instituted in any of his Majesty's courts in "the kingdom of *Ireland*; and all such writs, appeals, or proceedings "shall be, and they are thereby declared, null and void for all intents "and purposes." After the passing of the above statute, it was the practice in *Ireland*, to sue out a writ of error to the court of King's Bench there, to reverse a judgment of the court of law before the king in Chancery, or of the court of Common Pleas; or a writ of error to the court holden before the chancellor or treasurer, commonly called the Exchequer chamber, to reverse a judgment of the court of Exchequer; or a writ of error, returnable directly to parliament, to reverse a judgment of the court of King's Bench in that country^f:

After that statute, and before
40 Geo. III. c.
39.

But now, by the statute 40 Geo. III. c. 39. (Irish act,) for the more

By latter statute.

^a Append. to Tidd *Prac.* 9 Ed. Chap. XLIV. § 18.

^b 3 Blac. Com. 411; and see the statutes 31 Edw. III. Stat. 1. c. 12. 31 Eliz. c. 1. 16 Car. II. c. 2. & 20 Car. II. c. 4. 2 Bac. Abr. tit. Error, I. 3. Man. Ex. Pr. 478, &c. Tidd *Prac.* 9 Ed. 1140.

^c Dutton v. Howell, Shew P. C. 33.

^d 6 Ann c. 26. § 12; and see stat. 46 Geo. III. c. 151. concerning Appeals to

the House of Lords, from the court of Session in *Scotland*.

^e Append. to Tidd *Prac.* 9 Ed. Chap. XLIV. § 19; and see Tidd *Prac.* 9 Ed. 1140.

^f As to this appeal, see the valuable Treatise and Observations of the Lord Chief Commissioner *Adam*, on trial by jury in civil causes, p. 306, &c.

^g Stat. 40 Geo. III. c. 39. § 1. (Irish Act.)

speedy correction of erroneous judgments, given in the courts of law in that kingdom, the above writs of error were abolished; and it is enacted, that "where judgment hath been given, for the reversal "whereof a writ of error may now by law be brought, and where "judgment shall be given in any of the said courts of King's Bench, "in law before the king in Chancery, of Common Pleas, and of Exchequer respectively, writs of error may be sued forth of the Chancery, commanding transcripts of the records of such judgments respectively, to be brought before the chief justice of the court of King's Bench, the chief justice of the court of Common Pleas, the chief baron of the court of Exchequer, and the other justices of the said courts of King's Bench, and Common Pleas, and the other barons of the court of Exchequer, into a chamber, to be appointed by the chief governor or governors of *Ireland* for that purpose, and to be called the Exchequer chamber; and that the said chief justices, chief baron, and other justices and barons, or any nine of them, shall have power and authority to examine such judgments respectively, and to reverse or affirm the same, or to award such judgments as to law and justice shall pertain; and to send writs, as the case may require, to the courts from which such transcripts shall be respectively brought, directing such courts to cause execution to be done, as if the judgment had been originally awarded therein; and further, that the said chief justices, chief baron, justices and barons, shall and may, in all cases depending, award such costs, moderate, reasonable or exemplary, as to them shall appear just." ^a And, by another clause of the same statute ^b, "writs of error may be sued in the high court of *parliament*, by any party aggrieved by any judgment of the said chief justices, chief baron, justices and barons, for the further and due examination thereof: Provided always, that nothing therein contained shall be construed to give a right to any person to sue forth a writ to reverse a judgment in which the king is a party, other than as by law the same is now allowable."

The mode of proceeding by writ of error for reversing judgments given in the courts of King's Bench, Common Pleas, and Exchequer in this country, was materially altered, and is now regulated by the act for the more effectual administration of justice in *England* and *Wales* ^c; by which it is enacted, that "writs of error upon any judgment given by any of the courts of King's Bench, Common Pleas,

From superior courts of common law in *England*, by administration of justice act.

^a Stat. 39 Geo. III. c. 40. § 2.

^b *Id.* § 3.

^c 11 Geo. IV. & 1 W. IV. c. 70.

§ 8.

"and Exchequer, shall thereafter be made returnable only before the judges, or judges and barons, as the case may be, of the other two courts, in the Exchequer chamber ^a, any law or statute to the contrary notwithstanding; that a *transcript* of the record only shall be annexed to the return of the writ; and the court of error, after errors are duly assigned, and issue in error joined, shall, at such time as the judges shall appoint, either in term or vacation, review the proceedings, and give judgment, as they shall be advised thereon; and such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the court in which the original record remains; from which judgment in error, no writ of error shall lie or be had, except the same be made returnable in the high court of parliament."

What statutes are repealed thereby.

By this act, the several statutes relating to the bringing of writs of error, upon judgments in the Exchequer ^b, seem to be virtually repealed: And it is very doubtful whether the statute 27 *Eliz.* c. 8. for redress of erroneous judgments in the King's Bench, upon which a writ of error lay in the Exchequer chamber, before the justices of the Common Pleas and barons of the Exchequer, would be considered as still in force; it having been determined, that a writ of error founded upon the statute 27 *Eliz.* c. 8. cannot be returned under the statute 11 *Geo.* IV. & 1 *W.* IV. c. 70 § 8^c. And the latter statute applies only to cases where the action was originally commenced in the court to which the writ of error was directed ^d: Therefore, where the action was originally commenced in the court of Common Pleas, and was removed into the court of King's Bench by writ of error, and a writ of error was afterwards brought, under the late statute, to the court of Exchequer chamber, *Tindal* Ch. J. said, that it was not a case within the letter or contemplation of that statute; and observed, that it was clear that such a case could not be argued before the judges of the Common Pleas and Exchequer, because it might happen that the judges of the Common Pleas, assisted by the barons of the Exchequer, might reverse a judgment of the court of King's Bench, which had in the same case reversed the judgment of the court of Common Pleas ^e. The king, not being mentioned in the administration of justice act ^f, may still bring a writ of

Cases to which it does not extend.

^a For the forms of writs of error on this statute, and the returns thereto, see Appendix to *Tidd Sup.* 1830, p. 210.

^b 31 *Edw.* III. Stat. I. c. 12. 31 *Eliz.* c. 1. 16 *Car.* II. c. 2. 20 *Car.* II. c. 4.

^c *Gurney v. Gordon*, 2 *Cromp. & J.*

11. 2 *Tyr. Rep.* 16. S. C.

^d *Ricketts v. Lewis*, 2 *Cromp. & J.* 11. 2 *Tyr. Rep.* 14. S. C.

^e *Id. ib.*

^f 11 *Geo.* IV. & 1 *W.* IV. c. 70. § 8.

error in parliament, in the first instance. Writs of error also *coram nobis* in the King's Bench, or *coram vobis* in the Common Pleas^a, and the proceedings thereon, to reverse judgments in the *same* court, for error in *fact*, or in the *process*, &c. do not seem to be affected by the provisions of that act.

For suing out a writ of error in parliament, there must be a warrant from the crown, which is procured by the cursitor^b; and when the king is a party, the *fiat* of the attorney-general must be obtained, upon an application setting forth the errors intended to be assigned, accompanied with a certificate from counsel, that they are real errors. Anciently, it appears that where the king was a party, it was necessary to sue to him by petition, for leave to bring a writ of error, which could not be obtained *absque speciali gratiâ domini regis*^c. Afterwards, a distinction was made between cases where the *substance* of the first judgment was to be reversed, and where the error was in *mesme* process, or a *collateral* matter: In the first case, a petition to the king was necessary; but in the latter, the attorney general, in his discretion, might grant a writ of error without a petition to the king^d. At length, in the time of the Usurpation, the practice of petitioning the king for a writ of error, which was anciently used as a mark of decency and respect, was laid aside^e; and it has ever since been usual to grant it, on the *fiat* of the attorney-general^f.

The writ of error being made out, is sealed in Chancery, either on a general seal day, or, which is somewhat more expensive, at a private seal; and after being obtained from the cursitor, should be taken to the clerk of the errors of the court in which the judgment was given^g, who will *allow* the same, on being paid his fees, and make out a certificate or note of the allowance^h; a copy of which should be served on the attorney for the defendant in errorⁱ. The writ of error *coram nobis* is allowed by the master, in open court^k; and if brought on the ground of *coverture*^l, or of the defendant's being beyond sea^m, &c.

Suing out writ of error in parliament.

Sealing, and allowance, of writ of error, &c.

Coram nobis, or vobis.

^a *Ante*, 595, 6.

^b Sir Christopher Heydon's case, Godb. 247. Imp. K. B. 10 Ed. 758.

^c 23 Edw. III. 22. pl. 14; and see 22 Edw. III. 3. pl. 25. Hurlston's case, 2 Leon. 194.

^d Anon. Sav. 131.

^e Anon. 1 Salk. 264.

^f *Rex v. Lookup*, 3 Bur. 1901; and see *Palm. Proc. Dom. Proc.* 180, 81.

^g R. E. 36 Car. II. K. B.; and see R. T. 20 Car. I. K. B. R. T. 26 & 27 Geo.

II. § 2. in *Scac. Man. Ex. Append.* 209.

^h *Append. to Tidd Prac.* 9 Ed. Chap. XLIV. § 20.

ⁱ *Tidd Prac.* 9 Ed. 1144; and see *Jones v. De Lisle*, 3 Bing. 125. 10 Moore, 617. S. C.

^k L. P. E. 77; but see 2 Crompt. 3 Ed. 377. where it is said, that this writ may be allowed in *vacation* by the secondary.

^l *Append. to Tidd Prac.* 9 Ed. Chap. XLIV. § 21.

^m *Id.* § 24.

there should be an *affidavit* of the fact on which it is founded. The rule of allowance in that court ^a, being drawn up by the clerk of the rules, a copy of it is served on the attorney of the defendant in error. In the Common Pleas, the writ of error *ceram vobis* is allowed in court; and the rule of allowance ^b drawn up by the secondaries.

Power of judges to make general rules and orders, for regulating the practice of error.

By the administration of justice act ^c, we have seen ^d, that "in all cases relating to the practice of the courts of King's Bench, Common Pleas, or Exchequer, in matters over which the said courts have a common jurisdiction, or of or relating to the practice of the court of error thereinbefore mentioned, it shall be lawful for the judges of the said courts jointly, or any *eight* or more of them, including the chiefs of each court, to make general rules and orders, for regulating the proceedings of all the said courts; which said rules and orders so made, shall be observed in all the said courts; and no general rule or order respecting such matters, shall be made in any manner, except as aforesaid." In pursuance of the power given by this act, general rules were made by all the judges, in *Hilary* term 1834 ^e, to regulate the proceedings on writs of error, which will be particularly noticed hereafter. These rules contain an extensive reform of the whole course of proceedings upon writs of error, tending greatly to promote simplicity and dispatch in the practice, and to save unnecessary expense to the parties.

Rules made in pursuance thereof.

Writ of error, from what time a *supersedeas* of execution.

After final judgment, and before execution executed, a writ of error is, generally speaking, a *supersedeas* of execution, from the time of its allowance ^f, provided bail, when necessary, be put in and perfected in due time ^g; and the allowance is notice of itself ^h: Or if the plaintiff, before the allowance, had notice of the writ of error being sued out, it was from the time of that notice a *supersedeas* ⁱ: And, in the Exchequer, a writ of error was a *supersedeas* of execution, from the time of giving notice of the allowance to the plaintiff in the action, or

^a Append. to Tidd *Prac.* 9 Ed. Chap. XLIV. § 22.

^b *Id.* § 23.

^c 11 Geo. IV. & 1 W. IV. c. 70. § 11; and see 1 Rep. C. L. Com. 29.

^d *Ante*, 28.

^e R. Pr. H. 4 W. IV. reg. 9, &c. 5 Barn. & Ad. Append. xv, xvi. 10 Bng. 464, 5. 2 Cromp. & M. 8, &c.; and see 3 Rep. C. L. Com. 31. 36.

^f Tidd *Prac.* 9 Ed. 1145. (c.)

^g *Id.* (f.)

^h Perkins v. Woolaston, 1 Salk. 321.

Jaques v. Nixon, 1 Durnf. & E. 280.

Braithwaite v. Brown, 1 Chit. R. 238.

— v. Butler, *id.* 241. Cleghorn v. Des Anzes, 3 Moore, 83. Gow, 66. S. C.

ⁱ Perkins v. Woolaston, (or Parkins v. Wilson,) 1 Salk. 321. 6 Mod. 130. 2 Ld. Raym. 1260. S. C. Spratt v. Frederick, Say. Rep. 51; and see R. E. 36 Car. II. K. B. R. M. 28 Car. II. C. P. Meriton v. Stevens, Barnes, 205. Sykes d. Outes v. Dawson, *id.* 209.

his attorney or clerk in court^a: But, by a general rule of all the courts^b, "a writ of error shall be deemed a *supersedeas*, from the time of the allowance." By a subsequent rule^c, however, "no writ of error shall be a *supersedeas* of execution, until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued: provided, that if the error stated in such notice, shall appear to be frivolous, the court, or a judge upon summons, may order execution to issue." This rule has been holden to be sufficiently complied with, by a notice of the allowance of a writ of error, in an action of *slander*, stating the grounds of the error to be that the declaration, and every count thereof, is bad, the words not being actionable without special damage, and the *innuendoes* bad in law^d. But where the point stated in the notice of allowance of a writ of error, had been argued and decided on a rule granted to arrest the judgment, the court of Exchequer refused to allow execution to issue, as upon a frivolous ground of error^e.

Notice of allowance must state some particular ground of error.

By the statute 6 Geo. IV. c. 96. § 1. for preventing the delays occasioned to creditors by frivolous writs of error, brought on judgments given in his Majesty's courts of record at *Westminster*, and in the counties palatine, and in the courts of Great Session in *Wales*; it was enacted, that "upon any judgment thereafter to be given, in any "of the said courts, in any *personal* action, execution shall not be "stayed or delayed by writ of error, or *supersedeas* thereupon, without the special order of the court, or some judge thereof, unless a "recognizance, with condition according to the statute made in the "third year of the reign of his Majesty king *James* the first, intituled "*An act to avoid unnecessary delays of execution*, be first acknowledged in the same court." By this statute, bail in error is now required in all cases, after judgment for the plaintiff in any *personal* action, whether after verdict or by default, &c. unless it be otherwise ordered by the court or a judge. And, in the Common Pleas, the court would not dispense with bail in error, where the error, though real, was only matter of form^f: And it has been determined, that

Bail in error, in what cases required.

^a R. T. 26 & 27 Geo. II. § 2. Excheq. Man. Ex. Append. 209, 10. 4 Price, 289; and see Tidd *Prac.* 9 Ed. 530. 1145, 6.

^b R. H. 2 W. IV. reg. I. § 83. 3 Barn. & Ad. 386. 8 Bing. 300. 2 Crompt. & J. 191.

^c R. Pr. H. 4 W. IV. reg. 9. 5 Barn. & Ad. Append. xv. 10 Bing. 454. 2

Crompt. & M. 3.

^d Robinson v. Day, 2 Dowl. Rep. 501. 8 Leg. Obs. 317. S. C.

^e Gardiner (or Gardner) v. Williams, 1 Gale 91. 3 Dowl. Rep. 796. 10 Leg. Obs. 239. S. C.

^f Wadsworth v. Gibson, 1 Moore & P. 501. 4 Bing. 572. S. C.

money cannot be paid into court, in lieu of bail in error, unless by consent ^a.

Recognizance
of bail in error,
in what sum.

In *personal* actions, it is a rule, founded upon the statute 3 Jac. I. c. 8. that the recognizance should be acknowledged in *double* the sum adjudged to be recovered by the former judgment ^b; and accordingly it has been holden, that a recognizance of bail in error, for less than double the sum recovered by the judgment, does not operate as a *supersedeas* or stay of execution ^c. But upon error in *debt* on bond, though the bail were formerly bound in double the penalty recovered, yet, by the course of the King's Bench, it was deemed sufficient if they justified in double what was really due ^d: and, in the Common Pleas, if the bail were bound in double the sum secured by the condition, it was sufficient; though a further sum was due for interest and costs, and nominal damages had been recovered ^e. In the Exchequer of Pleas it was a rule ^f, that "in all cases where special bail was required on writs of error, if the bail were obliged to justify, each of them should justify himself in double the sum recovered by the judgment, on which the writ of error was brought; except where the penalty of a bond, or other specialty, was recovered by such judgment, in which case each of the bail should justify in such penalty only" ^g. And now, by a general rule of all the courts ^h, "a recognizance of bail in error shall be taken in double the sum recovered, except in case of a penalty; and in case of a penalty, in double the sum really due, and double the costs."

Time allowed
for justifying
bail in error,
when excepted
to in vacation.

In the King's Bench, if a rule for better bail was served in vacation, there was formerly, it seems, no occasion to justify until the next term; but the plaintiff in error must either have given notice of justifying the *same* bail, or put in such other bail as he would abide by, within the *four* days allowed by the rule; it having been determined, that he could not give notice of fresh bail after the *four* days, unless indeed the bail already put in were prevented from justifying by special circumstances, which must have been disclosed to the court by *affidavit*, at the time appointed for justifying ⁱ. In the Common Pleas, when the rule was served in vacation, the plaintiff in

^a Collins v. Gwynne, 2 Moore & S. 775.

^b Phillipson v. Browne, 2 Chit. R. 105.

^c Reed v. Cooper, 5 Taunt. 320.

^d Gomez Serra v. Munez, 2 Str. 821.

^e Dixon v. Dixon, 2 Bos. & P. 443.

^f R. E. 33 Geo. II. Excheq. Man. Ex. Append. 217.

^g Tidd Prac. 9 Ed. 1155, 6.

^h R. H. 2 W. IV. reg. L. § 26. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Crompt. & J. 175.

ⁱ Lunn v. Leonard, 1 Maule & S. 366. Ostreich v. Wilson, *id.* 367. (a.); and see Anon. 2 Chit. R. 84, 5.

error had not time of course to perfect his bail until the next term; but ought to have justified before a judge: and if the defendant in error were not satisfied with that, then the plaintiff in error, having done every thing in his power, was entitled to time for justifying until the next term, but not otherwise^a. In the Exchequer of Pleas it was a rule^b, that "if bail in error were excepted to, and notice of exception given in writing to the attorney or clerk in court for the plaintiff in error in *term* time, such bail should be perfected and justified within *four* days after notice so given, or the defendant in error might, in default thereof, have proceeded to execution, notwithstanding such writ of error: but where notice of exception was given in *vacation* time, then such bail should be perfected and justified upon the *first* day of the subsequent term, unless the defendant in error, his attorney or clerk in court, should consent to a justification before one of the barons; in which case such bail should justify themselves before a baron, within *four* days after notice of such exception given in writing to the plaintiff in error, his attorney or clerk in court: and in default of such justification, the defendant in error might have proceeded to execution, notwithstanding such writ of error."^c But, by a general rule of all the courts^d, "if bail in error are excepted to in *vacation*, and the notice of exception require them to justify before a judge, the bail shall justify within *four* days from the time of such notice, otherwise on the first day of the ensuing term."

Bail in error, when necessary, being complete, the next step to be taken by the plaintiff in error, except on a writ of error *coram nobis* or *vobis*, is to *certify* or *transcribe* the record; in order to which a transcript is made and sent, with the writ of error and return, into the court above. When no bail is required, this is the first step that is taken after the service of the allowance of the writ of error; and it was formerly holden, that the plaintiff in error should regularly cause the transcript to be made, (for the defendant in error cannot transcribe the record^e), by the time the writ of error was returnable. If the record were not certified by that time, the defendant in error might have given the plaintiff a *rule* to certify it^f, which was an *eight*

Certifying, or transcribing, record.

^a De Revose v. Hayman, Barnes, 211.

Hawkins v. Plomer, 2 Blac. Rep. 1064.

Imp. C. P. 7 Ed. 765, 6.

^b R. T. 26 & 27 Geo. II. § 2. Excheq. Man. Ex. Append. 210.

^c Tidd Prac. 9 Ed. 1157, 8.

^d R. H. 2 W. IV. reg. I. § 17. 3 Barn.

& Ad. 376. 8 Bing. 290. 2 Crompt. & J. 172, 3.

^e Anon. 1 Wils. 35.

^f Goodright v. Hugoson, Cas. temp. Hardw. 352. Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 39, 40.

Rule for, in
K. B. or C. P.

When obtained.

Service of.

Practice in Ex-
chequer.

When record
was certified, or
only a trans-
cript.

day rule, obtained from the clerk of the errors in the Common Pleas, on a writ of error from that court, returnable in the King's Bench, or from the clerk of the errors in the King's Bench, on a writ of error returnable in the Exchequer Chamber. This rule might have been had on the *essoign* day, when the writ of error was returnable in the Exchequer Chamber the first return of the term^a: And when the rule was obtained, a copy of it must have been forthwith made and served on the attorney for the plaintiff in error^b. In the Common Pleas, the rule to transcribe might have been served on the plaintiff in error; these rules being excepted out of the general practice, which required service on his attorney^c. In the Exchequer of Pleas, there was no rule given to transcribe^d; and it was not the practice for the defendant in error to enter up the judgment fully on the roll, unless the record was carried to the House of Lords, or he was specially required to do so by the plaintiff in error^e.

On a writ of error brought on a judgment in the Common Pleas, or any inferior court, in an adverse suit, the record itself was supposed to be removed, that it might remain as a precedent and evidence of the law in similar cases^f: But in the case of a *fine*, the transcript only was removed from the Common Pleas; for a fine was but a more solemn acknowledgment or contract of the parties, and was therefore no memorial of the law, and need only to be affirmed or vacated: if it were affirmed, the contract stood as it was; if vacated, the justices of the King's Bench might send for the *fine* itself, and reverse it, or they might send a writ to the Treasurer and Chamberlain, to take it off the file^g. Besides, if the record itself had been removed, and the fine affirmed, it could not have been engrossed, for want of a chirographer in the King's Bench^h. This distinction, however, was not attended to in practice; for on all writs of error returnable in the King's Benchⁱ, as well as in the Exchequer Chamber^j, or House of Lords^k, it was usual to send

^a Green v. Upton, Barnes, 410.

^b Law and Practice of Error, 88.

^c Green v. Upton, Barnes, 410.

^d Dunbar v. Parker, 9 Price, 593, 4. 3 Tyr. Rep. 866. (a.); and see Fidd Prac. 9 Ed. 1159.

^e 2 Bac. Abr. 202. F. N. B. 20. F. 1 Hen. VII. 19, 20. pl. 5. Rex v. North, 2 Salk. 565. 2 Barn. & Ad. 972. (a.)

^f Winchurch v. Belwood, 1 Salk. 337, 8. Fazachary v. Baldo, *id.* 341.

^g 2 Bac. Abr. 203.

^h R. M. 28 Car. II. C. P. Harris. Prac. C. P. 484. Rex v. North, 2 Salk. 565. Sampayo v. De Payba, 5 Taunt. 85. and see 2 Barn. & Ad. 972. (a.)

ⁱ Rutter v. Redstone, 2 Str. 837.

^j 1 Hen. VII. 19, 20. pl. 5. Whalley's case, Dyer, 375. Heydon v. Godsalve, (or Heydon v. Godsole,) Cro. Jac. 341, 2. 2 Bulst. 163, 4. S. C. Dethick v. Bradbourne, T. Raym. 5.

only a transcript of the record, and not the record itself^a: And by the statute 11 Geo. IV. & 1 W. IV. c. 70. § 8. "a transcript of the record only, shall be annexed to the return of the writ^b; and the court of error, after errors are duly assigned, and issue in error joined, shall, at such time as the judges shall appoint, either in term or vacation, review the proceedings, and give judgment, as they shall be advised thereon." And, on a writ of error from the Common Pleas, the chief justice certified only the body of the record, which was all that remained in his custody; for original and judicial writs remained with the *custos brevium* and other officers, and were never certified but when error was assigned for want of them^c.

In the King's Bench, and Common Pleas, the transcript was made by the clerk of the errors, who acted as clerk to the chief justice; and in order to enable him to make it, the defendant in error left with him the record, or copy of the proceedings, upon which he sent for the transcript money, on a part of it, to the plaintiff in error; and if paid, he proceeded to make the transcript, which was examined with the record by the attorney for the defendant in error^d. In the King's Bench, on a writ of error to the Exchequer Chamber, if the writ were returnable on the *first* return day of the term, the clerk of the errors took the whole of that term to make the transcript; if on the *last* return day, he took all the vacation following^e. In the Common Pleas, it was usual for the chief justice to sign the return^f; but this does not seem to have been absolutely necessary; at least, the court of King's Bench would not stay the proceedings, for want of his signature: and though the writ of error required the record to be sent *sub sigillo*, yet this was never practised^g.

Mode of certifying, or transcribing, in K. B. & C. P.

The transcript being made, examined, and paid for, was delivered over, with the writ of error and return^h, by the clerk of the errors, in the Common Pleas, to the signer of the writs in the King's Bench; or by the clerk of the errors of the King's Bench, to the clerk of the errors in the Exchequer Chamber, or his deputyⁱ. If a writ of

Delivery of transcript, &c. by and to whom, in K. B. & C. P.

^a Tidd *Prac.* 9 Ed. 1159.

^b Append. to Tidd *Sup.* 1839. pp. 211, 12, 13, 14.

^c Robert v. Andrews, Cro. Eliz. 84; and see Tidd *Prac.* 9 Ed. 1159.

^d L. P. E. 34, 5.

^e *Id.* 35.

^f Allen v. Shaw, 1 Sid. 268. Oleron-

shaw v. Stansforth, Barnes, 301. Hayes v. Thornton, *id.*

^g Blackwood v. South Sea Company, 2 Str. 1063, 4. Cas. temp. Hardw. 344. S. C.; and see Tidd *Prac.* 9 Ed. 1160.

^h Append. to Tidd *Prac.* 9 Ed. Chap. XLIV. § 41, 2.

ⁱ L. P. E. 35.

Rule to certify or transcribe, unnecessary.

error were brought in parliament, on a judgment in the King's Bench, the chief justice went in person, attended by the clerk of the errors, to the House of Lords, with the record itself, and a transcript, which was examined and left there; and then the record was brought back again into the King's Bench; and if the judgment were affirmed, that court might proceed on the record to grant execution: for if the record itself had been removed, and judgment affirmed, and the parliament dissolved, there could not have been any proceedings thereupon, to have execution^a: But now, by a general rule of all the courts^b, "no rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within *twenty* days after the allowance of the writ of error, get the transcript prepared and examined, with the clerk of the errors of the court in which the judgment is given, and pay the transcript money to him; in default whereof, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of *non pros*; and the clerk of the errors, shall, after payment of the transcript money, deliver the writ of error, when returnable, with the transcript annexed, to the clerk of the errors of the court of error." After the transcript of the record in error has been removed, the court below has no power to order judgment of *non pros* to be signed, because it was not ready in due time, although the defendant in error may have proceeded regularly^c.

Mode of compelling assignment of errors, in K. B.

If the plaintiff in error neglected to proceed after the record was certified, the defendant, in order to compel him, must formerly have sued out a *scire facias quare executionem non* in the court of King's Bench, wherein the writ of error was returnable, except on a writ of error *coram nobis*, or by the plaintiff to reverse his own judgment, or in *quare impedit*, where the judgment for the defendant is, that the plaintiff take nothing by his writ, but be in mercy for his false claim, and in all cases of the same nature, where there was no adjudication to the defendant of damages or costs. As the parties, in the King's Bench, had no day in court given to either of them, on the removal of the record by writ of error, the defendant in error had no other way of compelling the plaintiff to assign his errors, than by suing out a writ of *scire facias quare executionem non*^d, &c.; and if, upon such

Scire facias quare executionem non.

^a 2 Bac. Abr. 208.

Har. & W. 363. 10 Leg. Obs. 428. S. C.

^b R. Pr. H. 4 W. IV. reg. 10. 5 Barn. & Ad. Append. xv. 10 Bing. 454. 2 Cromp. & M. 3, 4.

^d Sir Edward Hobbye's case, Godb. 68. Anon. 2 Leon. 107; and see Tidd Pwnc.

^c Pitt v. Williams, 4 Dowl. Rep. 70. 1

9 Ed. 1107.

writ, the plaintiff in error did not assign errors, but suffered judgment to pass by default upon *scire feci*, or two *nihils*, no errors afterwards assigned would have prevented execution ^a.

In the Exchequer chamber, the defendant in error must formerly have given a rule for the plaintiff in error to allege diminution, or that the record was not duly certified or transcribed ^b. This was an *eight* day rule, given by the clerk of the errors in the Exchequer chamber ^c; and if the writ of error were returnable the first day of term, the plaintiff in error was to transcribe the same term, allege diminution the term following, assign errors the next term, and argue them the *fourth* term: but if the defendant in error, instead of serving the rule to transcribe at the return of the writ, neglected it for a term or two, the plaintiff must have transcribed in that term in which the rule was served, alleged diminution the same term, assigned errors the term following, and argued them the third term ^d. A copy of the rule to allege diminution being made, and served on the attorney for the plaintiff in error, it was incumbent on him to pay *eight* pence per folio for the proceedings to the clerk of the errors, and *2s. 4d.* for the rule, (which was called alleging diminution ^e;) within the *eight* days allowed by the rule; and if he neglected to do so, the clerk of the errors, on being applied to, with an *affidavit* of the service of a copy of the rule, would have signed a *non pros* ^f, and taxed the defendant in error his costs; but unless an *affidavit* was made, he usually sent to the attorney for the plaintiff in error, and if the money were not paid by the next morning, he would then have signed the *non pros* of course, and taxed the costs ^g.

Rule to allege diminution, and proceedings thereon.

When the plaintiff in error had alleged diminution, the next step to be taken by the defendant in error, was to give a rule for the plaintiff to assign errors; which, on a writ of error *coram nobis* or *vobis*, is the first proceeding, and may be given immediately after the allowance and notice of the writ of error ^h. It was also the first proceeding after the transcript was brought in, on a writ of error by the plaintiff to reverse his own judgment ⁱ, or when there was no adjudication to the defendant of damages or costs ^k. In the King's Bench, this

Rule to assign errors, when and how formerly given.

On error *coram nobis*, or *vobis*, &c.

In K. B.

^a *Moseley v. Cocks*, Carth. 40, 41; and see *Tidd Prac.* 9 Ed. 1165.

^b *Tidd Prac.* 9 Ed. 1165.

^c *Append. to Tidd Prac.* 9 Ed. Chap. XLIV. § 45.

^d L. P. E. 92.

^e *Imp. K. B.* 10 Ed. 724.

^f *Append. to Tidd Prac.* 9 Ed. Chap.

XLIV. § 114.

^g *Imp. K. B.* 10 Ed. 724; and see *Tidd Prac.* 9 Ed. 1167, 8.

^h 2 *Crompt.* 3 Ed. 377. *Imp. K. B.* 10 Ed. 757. L. P. E. 78.

ⁱ *Johnson v. Jebb*, 3 Bur. 1772.

^k *Ante*, 608.

was a *four* day rule, given by the master ^a, on the expiration of the rule to appear on the *scire facias* ^b; and after being entered with the clerk of the rules, a copy of it was made, and served on the attorney for the plaintiff in error ^c.

In Exchequer chamber.

No rule necessary to allege diminution, or assign errors, nor any *scire facias quare executionem non*.

In the Exchequer Chamber, if the plaintiff in error alleged diminution, the rule to assign errors was given the next term, with the clerk of the errors, in like manner as the rule to allege diminution, and expired in *eight* days after service ^d. And in that court, a plaintiff in error was not confined to taking out one rule in each term, but might have proceeded as quickly as he pleased ^e. But now, by a general rule of all the courts ^f, "no rule to allege diminution, nor rule to assign errors, nor *scire facias quare executionem non*, shall be necessary, in order to compel an assignment of errors; but within *eight* days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the court of error, or to the signer of the writs in the King's Bench, in cases of error to that court, or within *twenty* days after the allowance of the writ of error, in cases of error *coram nobis* or *coram vobis*, the plaintiff in error shall assign errors; and in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of *non pros*."

Assignment of errors, what.

Common.

Special.

An assignment of errors is in nature of a *declaration* ^g; and is either of errors in *fact*, or errors in *law*; which latter are *common* or *special*. The *common* errors are, that the declaration is insufficient in law to maintain the action; and that the judgment was given for the plaintiff instead of the defendant, or *vice versa*. *Special* errors are for some matter of law appearing on the face of the record, which shew the judgment to have been erroneous. If an infant by attorney assign for error *coram nobis*, that he has improperly appeared in the action by attorney, instead of by guardian, it is not, we have seen ^h, a mere irregularity, but a ground of error: The court, however, will, on application, set aside the assignment, and allow the plaintiff in error to

^a Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 46.

^b James v. Staples, 6 Durnf. & E. 367; and see Marshall v. Cope, 2 Str. 917. Tidd Prac. 9 Ed. 1168. (f.)

^c Tidd Prac. 9 Ed. 1168.

^d Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 47.

^e Home v. Bentinck, 1 Brod. & B. 514; and see Tidd Prac. 9 Ed. 1168.

^f R. Pr. H. 4 W. IV. reg. 11. 5 Barn.

& Ad. Append. xv. 10 Bing. 454. 2 Cromp. & M. 4.

^g 2 Bac. Abr. 216. For the forms of assignments of error, and joinders therein, before the administration of justice act, see Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 63. 86, 7. 95, 6, 7; and for the forms of assignments of error, and joinders on the above act, see Append. to Tidd Sup. 1830, p. 214, 15.

^h Ante, 596.

assign the error by guardian^a. The plaintiff may assign several errors in law, but only one error in fact^b; and he cannot assign error in fact and in law together, for these are distinct things, and require different trials^c: It is also settled, that nothing can be assigned for error which contradicts the record^d, or was for the advantage of the party assigning it^e, or that is aided by appearance, or not being taken advantage of in due time^f. Where exceptions are not properly taken in a bill of exceptions, as where they appear upon the record after the finding of the jury, the court of error cannot give judgment thereon^g. And a court of error will not enquire into the propriety of rules made by the court below, for amending the declaration, striking out pleas, or granting a new trial^h.

What errors may, or cannot be assigned.

The assignment of errors need not be signed by counselⁱ: In the King's Bench, it was formerly *delivered* to the defendant's attorney^j; in the Exchequer chamber, it was *filed* with the clerk of the errors: But, by a general rule of all the courts^k, "the assignment of errors, and subsequent pleadings thereon, shall be *delivered* to the attorney of the opposite party, and not *filed* with any officer of the court."

Assignment of errors need not be signed by counsel.

To be delivered, and not filed.

Formerly, if the plaintiff in error had assigned for error the want of an *original writ* or *bill*, or that it was bad in point of law, he must have regularly taken out a *certiorari*, to verify his errors; for it was a rule, that judgment could not be reversed, for want of an *original writ* or *bill*, nor for any supposed error or defect therein, without a *certiorari*^l. The error in such case, unless confessed, was not considered to be completely assigned, until it appeared, by the return to the *certiorari*, that it was well founded^m: And it was said,

Certiorari for original writ, or bill, abolished.

^a Beven v. Cheshire, 3 Dowl. Rep. 70.

1. 23.

^b F. N. B. 20. E.

^h Gully v. Bishop of Exeter, 10 Barn. & C. 584. 602, 3. 5 Man. & R. 457. S. C.; and see Mellish v. Richardson, 2 Moore & S. 191. 9 Bing. 125. S. C. accord.

^c 2 Bac. Abr. 217. Burdett v. Wheatly, 2 Ld. Raym. 883. Jeffry v. Wood, 1 Str. 439. Davie v. Franklin, H. 26 Geo. III. K. B.; and see Castledine v. Mundy, 4 Barn. & Ad. 90. 1 Nev. & M. 635. S. C.

ⁱ Carlton (or Carleton) v. Mortagh, 1 Salk. 268. 3 Salk. 399. 2 Ld. Raym. 1005. 6 Mod. 113. 206. S. C.

^d 2 Bac. Abr. 218. Helbut v. Held, 1 Str. 684. 2 Ld. Raym., 1414. S. C. Bradburn v. Taylor, 1 Wils. 85. S. P. Rex v. Carlile, 2 Barn. & Ad. 362. 971.

^k R. Pr. H. 4 W. IV. reg. 12. 5 Barn. & Ad. Append. xvi. 10 Bing. 454. 2 Crompt. & M. 4.

^e 2 Bac. Abr. 220. Thornby v. Fleetwood, 1 Str. 382; but see 2 Wms. Saund. 5 Ed. 46. b. (8.)

^l 9 Edw. IV. 32. pl. 5. 1 Rol. Abr. 764. M. Drew v. Rose, 2 Ld. Raym. 1398. Graddell v. Tyson, *id.* 1441. Franklyn v. Reeves, Cas. temp. Hardw. 118, 19.

^f 2 Bac. Abr. 221. Earl of Lonsdale v. Littleddale, 2 H. Blac. 267. 299.

^m Sterling v. Tanner, Com. Rep. 115.

^g Armstrong v. Lewis, 4 Moore & S.

that the plaintiff in error could not, till then, bring in the defendant to plead to the errors^a. Also, by the course of the King's Bench, if diminution were alleged, errors could not be entered till the *certiorari* was returned, and the rules to plead were expired^b. But now, as the mode of proceeding by *original writ* or *bill*, in *personal actions*, is abolished, the want of them cannot be assigned for error; and of course, a *certiorari*, for verifying the assignment of errors, is unnecessary.

Scire facias ad audiendum errores.

In the King's Bench, as the parties had no day in court after the record was removed, the plaintiff in error might, after he had assigned his errors, have had a *scire facias ad audiendum errores*^c against the defendant, who thereupon might have appeared and pleaded *in nullo est erratum*, or a release, &c. But in practice it was usual for the defendant in error, by consent, to take notice voluntarily of the assignment of errors; which consent was testified by his pleading *in nullo est erratum*, and then there was no occasion for a *scire facias ad audiendum errores*^d. The Exchequer Chamber not having the record before them, but only a transcript, did not award a *scire facias ad audiendum errores*; but notice was given to the parties concerned^e.

Unnecessary, unless in case of change of parties.

And, now, by a general rule of all the courts^f, "no *scire facias ad audiendum errores* shall be necessary, unless in case of a change of parties; but the plaintiff in error may demand a joinder in error, or plea to the assignment of errors, and the defendant in error, his executors or administrators, shall be bound, within *twenty* days after such demand, to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed: Provided, that if in any case the time allowed as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea or demurrer, shall not have expired before the 10th day of *August* in any year, the party entitled to such time shall have the like time, for the same purpose, after the 24th day of *October*, without reckoning any of the days before the 10th of *August*: Provided also, that in all cases, such time may be extended by a judge's order. In error to reverse a fine or common recovery, there ought to be a *scire facias* against the terretenants, *ad audiendum*

Scire facias ad audiendum processum et recordum.

^a Davenant v. Raftor, 2 Ld. Raym. 1047.

^b Daker v. Whiteacre, 1 Keb. 211; and see Tidd Prac. 9 Ed. 1170.

^c 2 Bac. Abr. 207. F. N. B. 20. E. Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 76, &c.

^d Moseley v. Cocks, Carth. 41; and see Tidd Prac. 9 Ed. 1172.

^e Anon. 1 Vent. 34; and see Tidd Prac. 9 Ed. 1173.

^f R. Pr. H. 4 W. IV. reg. 13. 5 Barn. & Ad. Append. xvi. 10 Bing. 454, 5. 2 Crompt. & M. 4, 5.

processum et recordum ^a: but to this they can only plead a release of errors ^b.

To an assignment of errors, the defendant may plead, or demur: Pleas in error are common, or special: The *common* plea, or *joinder* as it is more frequently called, is *in nullo est erratum* ^c, or that there is no error in the record or proceedings; which is in the nature of a demurrer, and at once refers the matter of law arising thereon, to the judgment of the court ^d. The *common* plea, or *joinder* in error, need not be signed by counsel ^e.

Pleading, or demurring, to assignment of errors.

Issue being joined in error, the proceedings were formerly entered of record, before the case was set down for argument; and on a writ of error from an inferior court, or from the Common Pleas to the King's Bench, the entries were usually made by the attorney for the *defendant* in error ^f, (though they might, it seems, have been made by the attorney for the *plaintiff* in error,) on different rolls, entitled of the term the writ of error was returnable ^g. In the Exchequer Chamber, the proceedings were entered by the clerk of the errors, who set down the cause at the instance of either party, without a motion for a *concilium* ^h. But now, by a general rule of all the courts ⁱ, "no entry on record of the proceedings in error shall be necessary, before setting down the case for argument; but after judgment shall have been given in the court of error in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll, remaining in the court below, on a certificate of a clerk of the errors of the Exchequer Chamber, of the judgment given, for which a fee of 3s. 4d. and no more, shall be charged."

Issue, and entry of proceedings in error.

By whom and how made, on error from inferior court, or C. P. to K. B.

In Exchequer chamber.

Now unnecessary.

On an issue in law, "the court of error, after errors are duly assigned, and issue in error joined, shall, at such time as the judges shall appoint, either in term or vacation, review the proceedings, and give judgment, as they shall be advised thereon." ^k In the

Reviewing proceedings, and giving judgment thereon.

^a Tidd *Prac.* 9 Ed. 1173. Append. thereto, Chap. XLIV. § 80.; and see R. Pr. H. 4 W. IV. reg. 13.

^b *Hall v. Woodcock*, 1 Bur. 360. Tidd *Prac.* 9 Ed. 1121. 1173.

^c Append. to Tidd *Prac.* 9 Ed. Chap. XLIV. § 81, 2. 94. 98.

^d Tidd *Prac.* 9 Ed. 1173.

^e *Grant (or Archbold) v. Smith*, 5 Dowl. Rep. 107. 1 Meeson & W. 740. S. C. Anou, 2 Har. & W. 64. Tidd *Prac.* 9 Ed. 1175.

^f Tidd *Prac.* 9 Ed. 717. 2 Sel. Pr. 512. 2 Crompt. Pr. 356.

^g For the manner in which these entries were formerly made in the King's Bench, see Tidd *Prac.* 9 Ed. 1175, and in the Exchequer chamber, *id.* 1176.

^h Tidd *Prac.* 9 Ed. 1176.

ⁱ R. Pr. H. 4 W. IV. reg. 16. 5 Barn. & Ad. Append. xvi, xvii. 10 Bing. 455. 2 Crompt. & M. 5, 6.

^k Stat. 11 Geo. IV. & 1 W. IV. c. 70. § 8. *Anie*, 600.

Motion for *concilium* formerly necessary, in K. B.

Aliter, in Exchequer chamber.

Now unnecessary.

Proceeding to argument, on issue in law.

King's Bench, either party might have moved for a *concilium*^a, drawn up and served the rule, entered the cause with the clerk of the papers, and proceeded to argument, as on demurrer^b: In the Exchequer Chamber, the clerk of the errors set down the cause, at the instance of either party, without a motion for a *concilium*: But now, by a general rule of all the courts^c, "when issue in law is joined, either party may set down the case for argument, with the clerk of the errors of the court of error, or the clerk of the rules in the King's Bench, as the case may require, and forthwith give notice in writing thereof to the other party, and proceed to argument, in like manner as on a demurrer, without any rule or motion for a *concilium*."

Previously to the day of argument, copies of the books, or proceedings in error, were formerly delivered, as on demurrer, by the plaintiff or his attorney to the chief justice and senior judge, and by the defendant, or his attorney, to the two other judges^d, in which were inserted the names of the counsel who signed the pleadings^e; and the exceptions intended to be insisted upon in argument, were required to be marked in the margin^f. In the Exchequer Chamber, it was a rule, that "no copy of error, and record thereupon, should be delivered to the justices or barons, before the attorney for the plaintiff in error should have given *ten days'* notice to the clerk of the errors in the Exchequer Chamber, that the error assigned in the record was to be argued before the said justices and barons, for both parties; and that the attorney for the plaintiff should deliver *four* copies to the justices of the Common Pleas, and the attorney for the defendant should deliver *four* other copies to the Barons of the Exchequer, *four* days before the hearing of the cause."^g To enable the parties to deliver these copies, a transcript of the proceedings was made for them, by the clerk of the errors^h: But, by a general rule of all the courtsⁱ, "*four* clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judg-

^a Append. to Tidd *Prac.* 9 Ed. Chap. XLIV. § 108.

^b Tidd *Prac.* 9 Ed. 738, &c. 1176.

^c R. Pr. H. 4 W. IV. reg. 14. 5 Barn. Ad. Append. xvi. 10 Bing. 455. 2 Crompt. & M. 5.

^d R. M. 17 Car. I. K. B.; and see R. E. 2 Jac. II. (a.) R. T. 40 Geo. III. K. B. 1 East, 131. Tidd *Prac.* 9 Ed. 738.

^e R. E. 18 Car. II. K. B. Tidd *Prac.* 9 Ed. 738.

^f R. E. 2 Jac. II. revived by R. H. 38 Geo. III. K. B.; and see R. H. 48 Geo. III. C. P. 1 Taunt. 403. Tidd *Prac.* 9 Ed. 505. 738. 1176.

^g R. E. 33 Car. II. Imp. K. B. 10 Ed. 729, 30. Tidd *Prac.* 9 Ed. 1177.

^h Tidd *Prac.* 9 Ed. 1177.

ⁱ R. Pr. H. 4 W. IV. reg. 15. 5 Barn. & Ad. Append. xvi. 10 Bing. 455. 2 Crompt. & M. 5.

ment of the court below, and of the assignment of errors, and of the pleadings thereon, to the judges of the King's Bench, on writs of error from the Common Pleas, or Exchequer, and to the judges of the Common Pleas, on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other judges of the court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default; and the party making default shall not be heard, until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies."

The judgment in error, unless the court are equally divided in opinion, is to *affirm*, or to *recall* or *reverse* the former judgment; that the plaintiff be *barred* of his writ of error, or that there be a *venire facias de novo*. The common judgment for the defendant in error, whether the errors assigned be in fact or in law, is that the former judgment be *affirmed*^a. So, on a demurrer to an assignment of errors in fact and in law, for duplicity, the judgment is *quod affirmetur*^b. For error in *fact*, the judgment is *recalled*, *revocatur*^c; and for error in *law*, it is *reversed*^d. And a court of error will give judgment of reversal, if there be error in law apparent on the face of the record, though error in fact only be assigned^e. On a plea of release of errors^f, or the statute of limitations^g, found for the defendant, the judgment is, that the plaintiff be *barred* of his writ of error^h.

Judgment of
affirmance, or
reversal, &c.

When the judgment is affirmed, or writ of error *nonprossed*, the defendant in error is entitled to costs and damages, by 3 Hen. VII. c. 10. and 19 Hen. VII. c. 20ⁱ. Upon these statutes, it has been holden that costs and damages are recoverable in error, for the delay of execution, although none were recoverable in the original action^k:

Costs and da-
mages, in error.

^a Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 119. 123. 131. 133.

^b Yelv. 58. Burdett v. Wheatly, 2 Ld. Raym. 883. Jeffry v. Wood, 1 Str. 439.

^c 2 Bac. Abr. 230; and see Tidd Prac. 9 Ed. 1178. Append. thereto, Chap. XLIV. § 122.

^d Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 120, 21. *id.* (a.) 124. 129. 136.

^e Castledine v. Mundy, 4 Barn. & Ad. 90. 1 Nev. & M. 635. S. C.

^f 1 Show. 50. Cunningham v. Hous-

ton, 1 Str. 627. Dent v. Lingood, *id.* 683; but see Ast. Ent. 339. Thornby v. Fleetwood, 1 Str. 318. 882. *semb. contra*.

^g Street v. Hopkinson, 2 Str. 1056. Cas. temp. Hartw. 345, S. C.

^h Tidd Prac. 9 Ed. 1178; and for the cases in which a *venire facias* is grantable *de novo*, see *id.* 922, 3.

ⁱ Tidd Prac. 9 Ed. 1180.

^k *Id.* 1181, and the authorities there referred to.

and executors and administrators are liable to costs in error, in cases where they would be liable in the original action^a. But these statutes are confined to judgments recovered by the original plaintiffs below, and affirmed in error; and do not extend to judgments recovered by the defendants below: Therefore, an avowant in *replevin*, for rent in arrear, for whom judgment was given below, which was affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered by the judgment^b. In an action of *slander*, wherein the declaration consisted of *ten* counts, the jury gave 50*l.* damages on the first count, and 100*l.* damages on the other *nine* counts; one of which latter counts was holden bad on error; and the plaintiff, having agreed to remit the 100*l.* damages, the court held that he thereby gave up all the costs on the last nine counts^c.

Interest formerly allowed as damages, on writ of error, after affirmance or *non pros*, in K. B.

Practice in Exchequer Chamber.

Interest only given, in cases where it was re-

On a writ of error returnable in the King's Bench, it was formerly the practice for that court, on motion, after affirmance, or *non pros* for not assigning errors, to order the master to compute interest on the sum recovered, by way of damages, from the day of signing final judgment below, down to the time of affirmance or *non pros*, and that the same should be added to the costs taxed for the plaintiff in the original action^d. In the Exchequer Chamber, though the court, it seems, were bound to allow double costs to the defendant in error, on the affirmance of a judgment after verdict in the King's Bench, yet it was entirely a matter in their discretion, whether or not interest should be allowed on such affirmance^e: And the course was said to be, for the officer to settle the costs, unless any particular direction were given by the court; and, in taxing them, he allowed double the money out of pocket, or thereabouts, but added no interest as a matter of course^f. In the latter court, there was a great variety of decisions, as to the cases in which interest was or was not recoverable, on the affirmance of a judgment^g; but it seemed at length to be the practice, to give interest only in cases where it was recoverable be-

^a Williams v. Riley, 1 H. Blac. 566; and see Caswell v. Norman, 2 Str. 977.

^b Golding v. Dias, 10 East, 2.

^c Dann (or Dadd) v. Crease, 2 Dowl. Rep. 269. 2 Crompt. & M. 223. 4 Tyr. Rep. 74. S. C.

^d Zinck v. Langton, Doug. 752. n. 3. and see Bishop of London v. Mercers' Company, 2 Str. 931. Bodily v. Bellamy, 2 Bur. 1096, 7. 1 Blac. Rep. 267, 8.

S. C. Entwistle v. Shepherd, 2 Durnf. & E. 79. Hilhouse v. Davis, 1 Maule & S. 171. 173.

^e Shepherd v. Mackreth, 2 H. Blac. 284.

^f Bodily v. Bellamy, 2 Bur. 1096; and see Shepherd v. Mackreth, 2 H. Blac. 284.

^g For these decisions, see Tidd Prac. 9 Ed. 1162, 3.

low^a; unless it were distinctly proved or admitted, that the writ of error was brought for delay^b: and therefore, though they once allowed interest in an action of *tort*^c, and on an attorney's bill^d, yet these decisions were afterwards disapproved of; and interest was refused in the latter action^e: and it was said to be contrary to the practice of the court, to give interest in an action for mere unliquidated damages^f. But now, by the late act for the further amendment of the law^g, &c. "if any person shall sue out any writ of error, upon any judgment whatsoever, given in any court, in any action personal, and the court of error shall give judgment for the defendant thereon, then *interest* shall be allowed by the court of error, for such time as execution has been delayed by such writ of error, for the delaying thereof." This enactment, however, applies only where the writ has been sued out, since the passing of the act^h.

coverable below, unless writ of error was brought for delay.

Interest now allowed on all writs of error, for the time execution has been delayed.

By the statute 13 Car. II. stat. 2. c. 2. § 10. "if the judgment be affirmed *after verdict*, the plaintiff shall pay to the defendant in error his double costs, for delay of execution:" which statute is confined to cases where the judgment so affirmed is for the plaintiff below; and does not apply where the defendant below obtains judgment upon a special verdictⁱ: nor where the party about to sue out a writ of error had, in order to avoid execution, paid the damages and costs to the opposite attorney, with a notice to retain them in his hands, and the attorney had deposited the sum in a bank, where it produced interest^k: But where, after demurrer to a replication in *formedon*, the demandant obtained judgment, and upon the trial of several issues in fact, a verdict being found in his favour, had judgment to recover his seisin against the tenant, and upon a writ of error brought, the common errors being assigned, the judgment was affirmed, the court held that the demandant was entitled to *double costs*, under the above statute^l. And, by the 8 &

Double costs, on affirmance of judgment for plaintiff, after verdict.

^a *Becher v. Jones*, 2 Campb. 428. n. and see *Porter v. Palgrave*, *id.* 472. *Boyce v. Warburton*, *id.* 480. *Marshall v. Poole*, 13 East, 98. *Slack v. Lowell*, 3 Taunt. 157. *Hannell v. Abel*, and *Middleton v. Gill*, 4 Taunt. 298. *De Tastet v. Rucker*, 9 Price, 440, 41. *Gurney v. Gordon*, 2 Tyr. Rep. 616. 619.

^b *Saxelby v. Moore*, 3 Taunt. 51.

^c *Earl of Lonsdale v. Littledale*, 2 H. Blac. 267. 287.

^d *Shepherd v. Mackreth*, *id.* 284. 287.

^e *Walker v. Bayley*, 2 Bos. & P. 219.

^f *Bristow v. Waddington*, 2 New Rep. C. P. 360; and see *Kingston v. M'Intosh*, 1 Campb. 518. *Becher v. Jones*, 2 Campb. 428. n.

^g 3 & 4 W. IV. c. 42. § 30; and see 3 Rep. C. L. Com. 36. 80.

^h *Burn v. Carvalho*, 1 Ad. & E. 896. 4 Nev. & M. 893. S. C.

ⁱ *Baring v. Christie*, 5 East, 545.

^k *Wright v. Fairfield*, 2 Barn. & Ad. 959.

^l *Cockerell v. Cholmeley*, 10 Barn. & C. 564. 576. 5 Man. & R. 509. S. C.

Costs in error,
on affirmance of
judgment, &c.
for defendant.

9 W. III. c. 11. § 2. "if any person shall commence or prosecute, in any court of record, any action, &c. wherein, upon any demurrer, either by plaintiff or defendant, &c. judgment shall be given by the court against such plaintiff; or if at any time after judgment given for the *defendant* in any *such* action, plaint or suit, the plaintiff shall sue any writ of error, to annul the said judgment, and the said judgment shall be afterwards affirmed, the writ of error discontinued, or the plaintiff be nonsuit therein, the defendant in every such action, &c. shall have judgment to recover his costs against every such plaintiff, and have execution for the same, by *capias ad satisfaciendum, fieri facias, or elegit*." ^a This statute is not confined to costs on writs of error, after judgment for the defendant on demurrer; but applies to all cases of writs of error, after judgment for the defendant, whether on demurrer or otherwise ^b. None of the before mentioned statutes give costs in error, upon the reversal of a judgment for error in *law* ^c: Therefore, when a judgment is reversed for such error, each party pays his own costs: But where a judgment for the plaintiff was reversed on a writ of error in *fact* brought by the defendant, the court held that the plaintiff in error was entitled to his costs of the defence of the original action, though not to the costs in error ^d. And where the plaintiff obtained a verdict, and the court of Exchequer arrested the judgment, which judgment was reversed on a writ of error by the court of Exchequer chamber, it was holden that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the court of Exchequer ^e.

Costs on reversal of judgment.

Taxation of costs in error, from the court of Exchequer.

The clerk of the errors having stated that costs in error from the court of Exchequer had been in practice allowed by the Lord Chancellor, before he ceased to be a member of the court of error ^f, and requesting to be informed of the course to be pursued in future, Lord *Tenterden* was understood to say, that he thought the costs in error, which were formerly allowed by the Lord Chancellor, as a member of the court of error, should now be taxed in the same manner as costs

^a And see stat. 8 & 9 W. III. c. 27. § 3. *Shepherd v. Mackreth*, 2 H. Blac. 287. *Tidd Prac.* 9 Ed. 1181.

^b *Ricketts v. Lewis*, 1 Barn. & Ad. 197; and see *Ferguson v. Rawlinson*, 2 Str. 1084. *Andr.* 114. S. C. *accord*; but see *Golding v. Dias*, 10 East, 4. *contra*.

^c *Wyvil v. Stapleton*, 1 Str. 617; and see *Bell v. Potts*, 5 East, 49.

^d *Anon. per Cur.* H. 40 Geo. III. K. B. *Tidd Prac.* 9 Ed. 1181.

^e *Adams v. Meredew*, 3 Younge & J. 419.

^f See stat. 31 Edw. III. st. 1. c. 12. 31 Eliz. c. 1. § 1. 16 Car. II. c. 2. 20 Car. II. c. 4. 11 Geo. IV. & 1 W. IV. c. 70. § 8. 11.

in error taxed on bills of exceptions ^a: And, for settling this point, a rule has been since made in the court of Exchequer chamber ^b, that "henceforth, the costs of proceedings upon writs of error, from the court of Exchequer to the Exchequer chamber, be taxed and allowed by the master of the court of Exchequer."

For regulating the taxation of costs, on appeals and writs of error, in the House of Lords, it is ordered, that "in all cases in which that House shall make any order for payment of costs, by any party or parties, in any appeal or writ of error, without specifying the amount, the clerk of the parliaments, or clerk assistant, shall, upon the application of either party, proceed for the taxation of such costs, in such manner as is directed by an act passed in the *seventh* and *eighth* years of the reign of his late Majesty king *George* the Fourth, intituled "an act to establish a taxation of costs on private bills in the House of Lords," ^c and shall give a certificate thereof, expressing the amount of such costs: And it is further ordered, that the same fees shall be demanded from and paid by the party applying for such taxation, for or in respect thereof, as are now or shall be fixed by any resolution of that House concerning fees, made or passed in pursuance of the said act, and in relation thereto: And the said clerk of the parliaments, or clerk assistant, may, if he thinks fit, either add or deduct the whole or a part of such fees, at the foot of his certificate; and the amount in money certified by him, after such addition or deduction, if any, shall be the sum to be demanded and paid under or by virtue of such order as aforesaid, for payment of costs." ^d

On appeals, and writs of error, in the House of Lords.

After affirmance, or *non pros* for not assigning errors, the defendant in error having taxed his costs, which may be done in *four* days exclusive after affirmance in the Exchequer chamber ^e, may take out execution for the sum recovered in the original action, as well as the damages and costs in error, or for these alone, by *feri facias* ^f against the goods and chattels of the plaintiff in error; by *elegit*, against his goods and a moiety of his lands, or by *capias ad satisfaciendum* ^g, against his *person*: And formerly, when the judgment was affirmed

Execution after affirmance, or *non pros*, by *feri facias*, &c.

^a Attorney-General v. Key, 2 Crompt. & J. 2. 10. 2 Tyr. Rep. 65. 75. S. C. per *Ld. Tenterden*, Ch. J.

^b R. M. 2 W. IV. Dax Ex. Pr. 2 Ed. Append. lxii. 3 Moore & S. 296. 2 Crompt. & J. 685. 2 Tyr. Rep. 761. 1 Crompt. & M. 466. 2 Dowl. Rep. 138.

^c Stat. 7 & 8 Geo. IV. c. 64. § 1, 2. Tidd Sup. 1830, p. 86.

^d *Ordo Dom. Proc.* 3d Apr. 1835. 9 Leg. Obs. 470.

^e Imp. K. B. 10 Ed. 739. 2 Sel. Pr. 2 Ed. 392.

^f Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 138, &c.

^g *Id.* § 146; and see Tidd Prac. 9 Ed. 1185.

Remittitur of transcript, in K. B.

Entry of proceedings after *remittitur*.

Out of what court execution issues.

in the Exchequer chamber^a, or House of Lords^b, to which a transcript of the record only was removed by the writ of error, it was necessary that the transcript should be *remitted* to the court of King's Bench, before the execution was issued, or at least before it was returnable^c. And when a writ of error determined in the Exchequer chamber, by abatement or discontinuance, the judgment was not again in the King's Bench, till there was a *remittitur* entered; for without a *remittitur*, it could not appear to that court, but that the writ of error was still pending in the Exchequer chamber^d; and therefore, in such case, it was usual for the party succeeding in the original action to move the court, on an *affidavit* of the fact, for leave to enter a *remittitur*, and take out execution^e: And on a writ of error from the King's Bench to the Exchequer chamber^f, or House of Lords^g, after the proceedings were remitted into the King's Bench, they were entered at the foot of the original roll in that court: And if a writ of error had been first brought in the Exchequer chamber, and afterwards in the House of Lords, the proceedings in both courts were entered, after a *remittitur*, on the same roll^h. But now, by the statute 11 Geo. IV. & 1 W. IV. c. 70. § 8. "the proceedings and judgment on the writ of error, as altered or affirmed, shall be entered on the original record; and such further proceedings as may be necessary thereon, shall be awarded by the court in which the original record remains; from which judgment in error, no writ of error shall lie or be had, except the same be made returnable in the high court of parliament."

The writ of execution being founded on the record, must formerly have issued in all cases out of the court of King's Bench, where the record wasⁱ; and that, as well where the judgment was affirmed on a writ of error *coram nobis*, or from the Common Pleas, or an inferior court, returnable in the King's Bench^k; as where it was affirmed in the Exchequer chamber^l, or House of Lords^m: But there was for-

^a Potter v. Turnor, Palm. 186, 7.

^b Vicars v. Haydon, Comp. 843.

^c Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 117. 128. 134.

^d Howard v. Pitt, 1 Salk. 261. Pennoir (or Penoyer) v. Brace, *id.* 319. 1 Ld. Raym. 244. S. C.

^e Giggeer's case, 1 Salk. 265. 1 Cromp. 3 Ed. 362. And for the form of a rule for execution on nonprossing a writ of error in the Exchequer of Pleas, see Tidd Prac. 9 Ed. 1185. Append. thereto, Chap. XLIV. § 118.

^f Append. to Tidd Prac. 9 Ed. Chap. XLIV. § 128.

^g *Id.* § 134.

^h Tidd Prac. 9 Ed. 1186.

ⁱ *Id.* 994, 5. Coot v. Linch, 1 Ld. Raym. 427. 1 Salk. 321. S. C.

^k Vicars v. Haydon, Comp. 843; but see Craswell v. Thompson, 4 Dowl. & R. 153.

^l Potter v. Turnor, Palm. 186, 7.

^m Vicars v. Haydon, Comp. 843; and see Tidd Prac. 9 Ed. 1186.

merly an exception to this rule, when a writ of error lay from the King's Bench in *Ireland* to the King's Bench in *England*; it being holden, that a *capias* did not lie here, for costs given upon affirmance of a judgment in *Ireland*: But the method there was to issue a writ, reciting all the proceedings here, directed to the chief justice of the King's Bench in *Ireland*, requiring him to issue process of execution; and by this mandatory writ the cause was restored to that court^a. But now, in consequence of the above statute, as a transcript of the record only is removed to the court of error, from the court in which the judgment is given, and the record, not being removed, remains in the court below, the execution is in all cases awarded and issued out of the latter court.

^a *Coot v. Linch*, 1 Ld. Raym. 427. 1 Ed. 1186.
Salk. 321. S. C.; and see *Tidd Prac.* 9

CHAP. XLV.

Of the ACTION of EJECTMENT.

What.

Excepted out of
stat. 3 & 4 W.
IV. c. 27.

Not affected by
uniformity of
process act.

Within what
time it must be
brought.

*Proviso in favour
of infants, females
covert, and per-
sons non compos*

THE action of *ejectment* is, in point of form, a *personal* action of *trespass*; but, in effect, it is a *mixed* action, by which a lessee for years, when ousted of his possession, may recover his term, and damages^a. An *ejectment* being excepted out of the statute 3 & 4 W. IV. c. 27. § 36. may still be brought for the recovery of the possession of lands, &c. : And as it is not affected by the uniformity of *process* act^b, it may be commenced, as before that act, either by *original writ*, in the King's Bench or Common Pleas, or by *bill* in the King's Bench, or Exchequer of Pleas^c.

This action, being founded on a right of entry, must be brought, by the statute 21 Jac. I. c. 16. § 1. within *twenty* years after the right or title of entry accrued; or, in case of an adverse possession, it may be barred by that statute: And as it is an action relating to *real* property, it will be governed by the statute 3 & 4 W. IV. c. 27^d; by which it is enacted, that "after the 31st day of *December* 1833, no "person shall bring an action to recover any land, but within *twenty* "years next after the time at which the right to bring such action "shall have first accrued, to some person through whom he claims; "or, if such right shall not have accrued to any person through whom "he claims, then within *twenty* years next after the time at which the "right to bring such action shall have first accrued to the person "bringing the same."

In the former of these statutes there is a *proviso*^e, that "if any person "or persons that hath or shall have such right or title of entry, be, or "shall be at the time of the said right or title first descended, accrued,

^a For the nature of the action of *ejectment*, when and for what things it will lie, and for what not, and by and against whom it is brought, and the proceedings therein, see Tidd *Prac.* 9 Ed. 1189, &c.

^b 2 W. IV. c. 39.

^c *Ante*, 60.

^d § 2. And for the time when the right shall be deemed to have first accrued, in different cases, see the above statute, § 3, &c.

^e § 2.

" come, or fallen, within the age of *one* and *twenty* years, *feme covert*, *mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said *twenty* years be expired, make his entry, as he might have done before that act, so as such person and persons, or his or their heir and heirs, shall, within *ten* years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue for the same, and at no time after the said *ten* years." And it is provided by the statute 3 & 4 W. IV. c. 27. ^a that " if at the time at which the right of any person to make an entry, or bring an action, to recover any land shall have first accrued, such person shall have been under any of the disabilities thereafter mentioned, that is to say, infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of *twenty* years thereinbefore limited shall have expired, make an entry, or bring an action, to recover such land, at any time within *ten* years next after the time at which the person to whom such right shall first have accrued, shall have ceased to be under any such disability, or shall have died, which shall have first happened."

In the present Chapter, it may be proper to notice several important alterations which have been recently made in the action of *ejectment*, under the following heads: 1. The proceedings by landlord against tenant, when the tenancy expires, or right of entry accrues, in or after *Hilary* or *Trinity* terms: 2. The title and commencement of the declaration: 3. The service thereof: 4. The certificate of the judge who tried the cause, for an immediate writ of possession: 5. The mode of suing it out: and lastly, the recognizance of bail in error.

By the late act for the more effectual administration of justice in *England* and *Wales* ^b, reciting that whereas landlords, to whom a right of entry into or upon any lands or hereditaments may accrue, during or immediately after *Hilary* and *Trinity* terms respectively, were unable to prosecute ejectments against their tenants, so as to try the same at the assizes immediately ensuing, whereby much delay was occasioned in the recovery of the possession of lands and tenements, wrongfully withheld by tenants against their landlords; it is enacted, that " in all actions of *ejectment* thereafter to be brought in any of his Majesty's courts at *Westminster*, by any

mentis, imprisoned, or beyond the seas.

Alterations in.

Proceedings in, by landlord against tenant, on administration of justice act, when tenancy expires, or right of entry accrues, in or after *Hilary* or *Trinity* terms.

^a § 16.

^b 11 Geo. IV. & 1 W. IV. c. 70. § 36.

Service of declaration, and notice.	“ landlord against his tenant, or against any person claiming through “ or under such tenant, for the recovery of any lands or hereditaments, where the tenancy shall expire, or the right of entry into “ or upon such lands or hereditaments shall accrue to such landlord, “ in or after <i>Hilary</i> or <i>Trinity</i> terms respectively, it shall be lawful “ for the lessor of the plaintiff in any such action, at any time within “ ten days after such tenancy shall expire, or right of entry accrue “ as aforesaid, to serve a declaration in <i>ejectment</i> , entitled of the day “ next after the day of the demise in such declaration ^a , whether the “ same shall be in term or in vacation, with a notice ^b thereunto subscribed, requiring the tenant or tenants in possession to appear and “ plead thereto within <i>ten</i> days, in the court in which such action “ may be brought; and proceedings shall be had on such declaration, “ and rules to plead entered and given, in such and the same manner, “ as nearly as may be, as if such declaration had been duly served “ before the preceding term: Provided always, that no judgment “ shall be signed against the casual ejector, until default of appearance and plea within such <i>ten</i> days; and that at least <i>six</i> clear “ days' notice of trial shall be given to the defendant, before the “ commission day of the assizes at which such <i>ejectment</i> is intended “ to be tried: Provided also, that any defendant in such action may, “ at any time before the trial thereof, apply to a judge of either of “ his Majesty's superior courts at <i>Westminster</i> , by <i>summons</i> , in the “ usual manner, for time to plead, or for staying or setting aside the “ proceedings, or for postponing the trial until the next assizes; “ and that it shall be lawful for the judge, in his discretion, to make “ such order in the said cause, as to him shall seem expedient.” And “ that, “ in making up the record of the proceedings on any such declaration in <i>ejectment</i> , it shall be lawful to entitle such declaration “ specially, of the day next after the day of the demise therein, whether such day shall be in term or vacation; and no judgment thereupon shall be avoided or reversed, by reason only of such special “ title.” ^c
Proceedings thereon, and giving rules to plead.	
Judgment against casual ejector.	
Notice of trial.	
Application by defendant, for time to plead, &c.	
Record, how made up.	
Construction of statute, and decisions thereon.	• This statute applies only to issuable terms ^d : and under it, when a landlord's right of entry accrued on the day after the <i>essoins</i> day of

^a Append. to Tidd *Sup.* 1833, p. 338. and see Append. to Tidd *Sup.* 1830, p. 216.

^b *Id.* 216; and for the form of an *affidavit* of service of declaration and notice, on this statute, see Append. to Tidd *Sup.* 1833, p. 329.

^c Stat. 11 Geo. IV. & 1 W. IV. c. 70. § 37. And for the mode of making up the record on this statute, see Append. to Tidd *Sup.* 1833, p. 329, 30. and Append. to Tidd *Sup.* 1830, p. 216.

^d *Doe v. Roe*, 2 Crompt. & J. 123. 1 Dowl. Rep. 304, S. C.

Trinity term, it was holden that he was not entitled to serve a declaration in *ejectment* as of that term ^a. So, where the tenancy under an agreement expired the day before the *first* day of *Trinity* term, it was holden not to be a case within the statute ^b. And the statute does not it seems apply to cases where the *ejectment* is brought in *Middlesex*, for the recovery of premises situate in that county; but only where the cause is to be tried at the *assizes* ^c. The waiver of a tenant in possession, however, will enable a landlord to proceed in *ejectment*, according to the provisions of the above statute, in cases to which it does not in strictness apply ^d. And it is no ground for setting aside a verdict for the plaintiff, that he did not give *six* clear days' notice of trial, as required by the statute; the defendant having appeared, and made his defence ^e: nor is it a defence at *nisi prius*, that the declaration was irregularly served; as where it was served after the term, in a case not within the statute ^f.

The declaration in *ejectment* should regularly be *entitled* of the term in which it is delivered; or if, as is usual, it be delivered in vacation, of the preceding term; and though the demise be laid after the first day of that term, yet the defendant, being a nominal person merely, cannot take advantage of the objection; and if the tenant appear, and apply to be admitted defendant instead of the casual ejector, he is then bound, by the consent rule, to accept a declaration, entitled of a subsequent term, which obviates the objection ^g. So, if the declaration be not entitled of any term, the omission is immaterial ^h: and no advantage can be taken of its being entitled by mistake of a wrong term, provided the tenant has sufficient notice given him to appear ⁱ. When the *ejectment* is brought by a landlord

Title and commencement of declaration.

^a Doe v. Roe, 1 Dowl. Rep. 79. 2 Leg. Obs. 367. S. C.

^b Doe d. Summerville v. Roe, 4 Moore & S. 747.

^c Doe d. Norris v. Roe, 1 Dowl. Rep. 547. 5 Leg. Obs. 431. S. C. per Parke, J.

^d Doe v. Roe, 7 Leg. Obs. 140. per Littledale, J.

^e Doe d. Antrobus v. Jepson, 3 Barn. & Ad. 402.

^f Doe d. Rankin v. Brindley, 1 Nev. & M. 1. 4 Barn. & Ad. 84. S. C.

^g Run. Eject. 2 Ed. 239, 40. Ad. Eject. 3 Ed. 207, 8.

^h Goodtitle d. Price v. Badtittle, H. 58

Geo. III. K. B. Ad. Eject. 3 Ed. 207.

ⁱ Goodtitle d. Ranger v. Roe, 2 Chit. R. 172. Doe v. Graves, *id. ib.* Anon. *id.* 172. S. Anon. 1 Dowl. Rep. 4. 1 Leg. Obs. 46. S. C. per Littledale, J. Doe v. Roe, 2 Dowl. Rep. 186. 6 Leg. Obs. 235. S. C. per Taunton, J. Doe d. Fry v. Roe, 3 Moore & S. 370. Doe d. Ashman v. Roe, 1 Bing. N. R. 253. 1 Scott, 166. S. C. Doe d. Smithers v. Roe, 4 Dowl. Rep. 374. 11 Leg. Obs. 486. S. C. and see Ad. Eject. 3 Ed. 207, 8. Tidd Prac. 9 Ed. 1204; but see Roe d. Stephenson v. Doe, Barnes, 186. Doe d. Gowland v. Roe, 5 Dowl. Rep. 273.

Recital of
original writ
unnecessary.

on the administration of justice act^a, where the tenancy expires, or right of entry accrues, in or after *Hilary* or *Trinity* terms, the declaration should be entitled of the day next after the day of the demise therein. And though the rule of *Mich. 3 W. IV. reg. 15.* by which every declaration is to be entitled in the proper court, and of the day of the month and year on which it is filed or delivered, does not, we have seen^b, apply to actions of *ejectment*, yet it has been holden that a declaration in *ejectment* need not be entitled of any term, or of a particular day as of some term; but it is sufficient if it be entitled, according to the above rule, of a particular day of the month and year, as "on the — day of — 18 —." ^c It was formerly usual for the declaration in *ejectment* by *original*, to repeat the whole of the *original* writ: But now, by a general rule of all the courts^d, "the rules heretofore made in the courts of King's Bench^e and Common Pleas^f respectively, for avoiding long and unnecessary repetitions of the *original* writ in certain actions therein mentioned, shall be extended and applied, in the courts of King's Bench, Common Pleas, and Exchequer of Pleas, to all *personal* and *mixed* actions; and, in none of such actions, shall the *original* writ be repeated in the declaration, but only the nature of the action stated in manner following, viz. '*A. B. was attached to answer C. D. in a plea of trespass, or in a plea of trespass and ejectment,*'^g or as the case may be; and any further statement shall not be allowed in costs."

Declaration may
be served before
first day of term.

The declaration in *ejectment* must formerly have been delivered before the *essoin* day of the term, in which the notice was given to appear; otherwise the plaintiff could not have had judgment till the next term^h: And where the service of the declaration was before the *essoin* day, but the explanation of it to the tenant in possession did not take place till after, the court held that the lessor of the plaintiff was not entitled to judgmentⁱ. But now, by a general rule of all the courts^k, "declarations in *ejectment* may be served before the first day

^a 11 Geo. IV. & 1 W. IV. c. 70. § 86.
Ante, 623, 4.

^b *Ante*, 208.

^c Doe d. Fry v. Roe, 3 Moore & S. 370. Doe d. Ashman v. Roe, 1 Bing. N. R. 253. 1 Scott, 166. S. C.

^d R. H. 2 W. IV. reg. 4. 3 Barn. & Ad. 391. 8 Bing. 303. 2 Crompt. & J. 200.

^e R. M. 1654. § 12. K. R.

^f R. M. 1654. § 16. C. P.

^g For the form of a declaration in *ejectment* by *original*, since the above rule, see Append. to Tidd Sup. 1833, p. 338.

^h Roe d. Bird v. Doe, Barnes, 172, 2.

ⁱ Doe v. Roe, 1 Dowl. & R. 563.

^k R. T. 1 W. IV. reg. VII. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 472.

of any term; and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the *essoin*, or *first general return day*."

When the tenant in possession, or his landlord, does not appear, and enter into the consent rule to be made defendant instead of the casual ejector, and to confess lease, entry, and ouster, &c. judgment may be signed against the casual ejector by default, on the expiration of the rule for judgment, and a writ of possession immediately sued out and executed, in term or vacation^a. And, in the Common Pleas, when the plaintiff was *nonsuited* at the assizes, or sittings after term, on account of the tenant or landlord's not appearing at the trial, and confessing lease, entry, and ouster, he was formerly allowed to sign judgment, and take out execution, immediately after the trial^b: But, in the King's Bench, he was not allowed to sign judgment against the casual ejector, until the day in bank, or first day of the ensuing term^c. And, in all the courts, where a *verdict* was given for the plaintiff in vacation, he was obliged to wait till the ensuing term, before he could sign judgment, or take out execution. To remedy this inconvenience, and to make the practice uniform in all the courts, it is enacted by the statute 11 Geo. IV. & 1 W. IV. c. 70.^d, for the more effectual administration of justice in *England and Wales*, that "in all cases of " trials of *ejectments at nisi prius*, when a *verdict* shall be given for " the plaintiff, or the plaintiff shall be *nonsuited* for want of the de- " fendant's appearance to confess lease, entry, or ouster, it shall be " lawful for the judge before whom the cause shall be tried, to certify " his opinion, on the back of the record^e, that a writ of possession " ought to issue immediately; and upon such certificate, a writ of " possession^f may be issued forthwith; and the costs may be taxed, " and judgment signed and executed afterwards, at the usual time, as " if no such writ had issued: Provided always, that such writ, in- " stead of reciting a recovery by judgment, in the form now in use, " shall recite shortly, that the cause came on for trial at *nisi prius*, at " such a time and place, and before such a judge, (naming the " time, place, and judge,) and that thereupon the said judge certi- " fied his opinion that a writ of possession ought to issue imme- " diately."^g

Judgment and execution, when tenant, or landlord, does not appear.

On nonsuit, for not confessing lease, &c. in C. P.

In K. B.

On verdict for plaintiff.

By stat. 11 Geo. IV. & 1 W. IV. c. 70. § 38.

Judge's certificate, for immediate writ of possession.

^a Tidd Prac. 9 Ed. 1224.

^b *Id.* 1240.

^c *Id.* 1240, 41.

^d § 38.

^e Append. to Tidd Sup. 1833, p. 330.

^f For the entry of the certificate on re-

cord; see *id.* 381.

^g Append. to Tidd Sup. 1830, p. 216,

17. And for forms of writs of *feri facias*, and *copias ad satisfaciendum*, for damages and costs, after verdict for the plaintiff in *ejectment*, see *id.* 217, 18.

Construction of this statute, and decisions thereon.

The provisions of this act, relating to the issuing of a writ of *habere facias possessionem*, are not affected by the statute 1 W. IV. c. 7.^a And it has been holden, that the judge has no discretion under it, as to the time at which the lessor of the plaintiff shall have possession; but must either grant a certificate to enable him to get immediate possession, or let the case take its regular course^b: and if the judge should think that some time ought to be allowed to the defendant, he will grant a certificate for immediate possession; the lessor of the plaintiff undertaking not to enforce it for a certain time^c. If a lessor of the plaintiff be nonsuited, for want of the defendant's confessing lease, entry, and ouster, the judge will not grant a certificate, under the above statute, to give the lessor of the plaintiff immediate possession, unless an *affidavit*, stating the circumstances of the case, be laid before him^d. And where it was intimated at the trial, by the defendant's counsel, that he should move in the next term for a new trial, on the ground of certain evidence having been admitted which was not receivable in point of law, the judge who tried the cause said that, under these circumstances, he should refuse to certify^e. An *ejectment* having been brought on two demises, and a verdict taken for the plaintiff on one, and for the defendant on the other, and leave being reserved to the plaintiff to move to enter a verdict for him on the second demise, he is not precluded from doing so, by his having obtained early execution on the verdict on the first demise, and possession having been taken under it^f.

Præcipe for *habere facias possessionem*, unnecessary.

Writ need not be signed.

On suing out the writ of *habere facias possessionem*, a *præcipe* was formerly required in the King's Bench^g, but not in the Common Pleas^h: And now, by a general rule of all the courtsⁱ, "a writ of *habere facias possessionem* may be sued out, without lodging a *præcipe* with the officer of the court." This writ was formerly signed, in the King's Bench, by the signer of the writs; and, in the Common Pleas, by the prothonotaries: But, by a general rule of all the courts^k, "it

^a *Ante*, 566.

^b *Doe d. Williamson v. Dawson*, 4 Car. & P. 589. *per Taunton, J.* *Doe d. Packer v. Hilliard*, 5 Car. & P. 132. *per Park, J.*

^c *Doe d. Packer v. Hilliard*, 5 Car. & P. 132. *per Park, J.*

^d *Per Littledale, J.* 4 Car. & P. 589; and for the form of this *affidavit*, see Appendix to Tidd *Sup.* 1833, p. 330.

^e *Doe d. Cook v. Barrett*, 1 Leg. Obs.

351. *per Garrow, B.*

^f *Doe d. Bank of England v. Chambers*, 4 Ad. & E. 410.

^g Imp. K. B. 10 Ed. 596.

^h 2 Sel. Pr. 2 Ed. 100. 121. Imp. C. P. 7 Ed. 631.

ⁱ R. H. 2 W. IV. reg. 1. § 76. 3 Barn. & Ad. 385. 8 Bing. 299. 2 Crompt. & J. 169.

^k R. H. 2 W. IV. reg. 1. § 75. *Id.* 3-

shall not be necessary that any writ of execution shall be signed; but no such writ shall be sealed, till the judgment paper, *postea*, or inquisition, has been seen by the proper officer."

In the King's Bench, the practice formerly was, for the plaintiff in error, or his bail, to enter into a recognizance, in *double* the improved rent, or yearly value of the premises, and *single* amount of the costs^a. In the Common Pleas, the clerk of the errors governed himself, in fixing the penalty of the recognizance, by the amount of the rent of the premises, and took the recognizance in *two* years' rent or profits, and double costs^b: and where the plaintiff in error entered into the recognizance, it was not necessary for him, in that court, to give the defendant in error notice thereof^c; nor could he be examined, in the King's Bench, as to his sufficiency^d: though, when bail in error was put in, notice thereof must have been given, and they might have been examined, as in other cases. In the Exchequer, the bail must formerly have justified in *double* the improved annual rent, or value of the premises recovered^e: But now, by a general rule of all the courts^f, "in *ejectment*, the recognizance of bail in error shall be taken in double the yearly value, and double the costs."

Recognizance
of bail in error,
in what sum.

^a Keene d. *Ld. Byron v. Deardon*, 8 East, 296; and see *Doe v. Roache*, *Cas. temp. Hardw.* 374.

^b *Doe d. Webb v. Goundry*, 7 Taunt. 428. 1 Moore, 119, 20. S. C.; and see *Doe d. Fenwick v. Pearson*, Barnes, 103. *accord.*

^c *Doe d. Webb v. Goundry*, 7 Taunt.

427. 1 Moore, 118. S. C.

^d Keene d. *Ld. Byron v. Deardon*, 8 East, 299.

^e R. E. 33 Geo. II. in *Scac. Man. Ex.* Append. 217.

^f R. H. 2 W. IV. reg. 1. § 27. 3 Barn. & Ad. 377. 8 Bing. 291. 2 Crompt. & J. 175.

APPENDIX

OF FORMS, IN THE STATUTORY RULES OF PLEADING, AND SCHEDULE ANNEXED THERETO^a, &c.

(§ 1.) Commencement of declaration in a second action, after plea of non-joinder in former one. *Ante*, 210, 11.

[*Venue.*] *A. B.* by *E. F.* his attorney, [or, in his own proper person," &c.] complains of *C. D.* and *G. H.* who have been summoned to answer the said *A. B.*, and which said *C. D.* has heretofore pleaded in abatement the non-joinder of the said *G. H.*, &c. [*the same form to be used, mutatis mutandis, in cases of arrest or detainey*].

(§ 2.) Plea of payment of money into court. *Ante*, 312, 13.

C. D. } The — day of —, in the year of our Lord 18—. *ats.* } The defendant, by — his attorney, [or "in person," &c.] *A. B.* } says that the plaintiff ought not further to maintain his action; because the defendant now brings into court the sum of £ —, ready to be paid to the plaintiff: And the defendant further saith, that the plaintiff has not sustained damages, [or, in actions of debt, "that he is not indebted to the plaintiff,"] to a greater amount than the said sum, &c. in respect of the cause of action in the declaration mentioned: and this he is ready to verify, wherefore he prays judgment, if the plaintiff ought further to maintain his action.

(§ 3.) Form of issue, in K. B. C. P. or Exchequer. *Ante*, 443.

In the King's Bench,
Common Pleas, or
Exchequer.

The — day of —, in the year of our Lord
18 —, [*date of declaration.*]

[*Venue.*] *A. B.* by *E. F.* his attorney, [or in his own proper person, or by *E. F.* who is admitted by the court here to prosecute for the said *A. B.*

^a The issues, judgments, and other proceedings, in actions commenced by process under 2 W. IV. c. 39. are directed by the statutory rules of pleading to be in the several forms in the schedule thereunto annexed, or to the like effect, *mutatis mutandis*: provided, that in case of non-com-

pliance, the court or a judge may give leave to amend.

^b This and the following forms, except the 10th, are in the schedule annexed to the statutory rules of pleading. The 10th form is referred to in R. Pr. H. 4 W. IV. reg. 20. and given at the end of that rule.

who is an infant within the age of twenty-one years, as the next friend of the said *A. B.* as the case may be,] complains of *C. D.* who has been summoned to answer the said *A. B.* [or arrested, or detained in custody,] by virtue [or served with a copy, as the case may be,] of a writ issued on — the — day of —, in the year of our Lord 18—, [date of first writ,] out of the court of our Lord the King before the King himself at *Westminster*, [or out of the court of our Lord the King before his justices at *Westminster*, or out of the court of our Lord the King before the barons of his Exchequer at *Westminster*, as the case may be,] for that

[Copy the declaration, from these words to the end, and the plea and subsequent pleadings to the joinder of issue.]

Thereupon the sheriff is commanded, that he cause to come here on the — day of —, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.

[After the joinder of issue, proceed as follows:]

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed twenty pounds, hereupon, on the — day of —, in the year —, [teste of writ of trial,] pursuant to the statute in that case made and provided, the sheriff [or the judge of —, being a court of record for the recovery of debt in the said county, as the case may be,] is commanded, that he summon twelve, &c. who neither, &c. who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly; and when the same shall have been tried, that he make known to the court here, what shall have been done by virtue of the writ of our Lord the King to him in that behalf directed, with the finding of the jury thereon indorsed, on the — day of —, &c.

(§ 4.)
Form of issue,
when directed
to be tried by
the sheriff.
Ante, 443, 4.
468.

William the Fourth, &c. To the sheriff of our county of —, [or to the judge of —, being a court of record for the recovery of debt in our county of —, as the case may be.]

(§ 5.)
Form of writ of
trial.
Ante, 467.

Whereas *A. B.* in our court before us at *Westminster*, [or in our court before our justices at *Westminster*, or in our court before the barons of our Exchequer at *Westminster*, as the case may be,] on the — day of — last, [date of first writ of summons,] impleaded *C. D.* in an action on promises, [or as the case may be.] For that whereas on, &c. [here recite the declaration, as in a writ of inquiry,] and thereupon he brought suit. And whereas the defendant, on the — day of — last, by — his attorney, [or as the case may be,] came into our said court, and said [here recite the pleas and pleadings, to the joinder of issue;] and the plaintiff did the like. And whereas the sum

sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l*. and it is fitting that the issue above joined should be tried before you the said sheriff of —, [*or judge, as the case may be.*] We therefore, pursuant to the statute in such case made and provided, command you, that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in no wise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try such issue accordingly; and when the same shall have been tried in manner aforesaid, we command you, that you make known to us at *Westminster*, [*or to our justices at Westminster, or to the barons of our said Exchequer, as the case may be,*] what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the — day of — next. Witness — at *Westminster*, the — day of —, in the — year of our reign.

(§ 6.)
Form of indorsement thereon, of verdict.

Ante, 470.

Afterwards, on the — day of —, in the year —, [*day of trial,*] before me, sheriff of the county of —, [*or judge of the court of —,*] came as well the within named plaintiff, as the within named defendant, by their respective attornies within named, [*or as the case may be,*] and the jurors of the jury by me duly summoned as within commanded, also came, and being duly sworn to try the said issue within mentioned, on their oath said, that &c. [*as in the verdict.*]

(§ 7.)
The like, in case a nonsuit takes place.

Ante, 470.

[*After the words "duly sworn to try the issue within mentioned," proceed as follows:*]

And were ready to give their verdict in that behalf; but the said *A. B.* being solemnly called, came not, nor did he further prosecute his said suit against the said *C. D.*

(§ 8.)
Form of judgment for the plaintiff, after trial by the sheriff.

[*Copy the issue, and then proceed as follows:*]

Afterwards, on the — day of —, in the year —, [*day of signing judgment,*] came the parties aforesaid, by their respective attornies aforesaid, [*or as the case may be;*] and the said sheriff [*or judge, as the case may be,*] before whom the said issue came on to be tried, hath sent hither the said last mentioned writ, with an indorsement thereon; which said indorsement is in these words, to wit:

[*Copy the indorsement.*]

Therefore it is considered, &c. [*in the same form as before.*]

APPENDIX.

ORIGINALS.

Description of the Documents.	Date.
Deed of covenant, between <i>A. B.</i> and <i>C. D.</i> } 1st part, and <i>E. F.</i> 2d part.	1st January, 1828.
Indenture of lease, from <i>A. B.</i> to <i>C. D.</i>	1st February, 1828.
Indenture of release, between <i>A. B.</i> and <i>C. D.</i> } 1st part, &c.	2d February, 1828.
Letter, defendant to plaintiff.	1st March, 1828.
Policy of insurance on goods, by ship <i>Isabella</i> , } on voyage from Oporto to London.	3d December, 1827.
Memorandum of agreement, between <i>C. D.</i> } captain of said ship, and <i>E. F.</i>	1st January, 1828.
Bill of exchange for 100 <i>l.</i> at three months, } drawn by <i>A. B.</i> on and accepted by <i>C. D.</i> } indorsed by <i>E. F.</i> and <i>G. H.</i>	1st May, 1829.

COPIES.

Description of Documents.	Date.	Original or duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of } <i>A. B.</i> in the parish } of <i>X.</i>	1st January, 1808.	
Letter, plaintiff to de- } fendant.	1st February, 1828.	{ Sent by general post, 2d February, 1828.
Notice to produce papers, 1st March, 1828.		{ Served 2d March, 1828, on defend- ant's attorney, by <i>E. F.</i> of —.
Record of a judgment of } the court of King's } Bench, in an action } <i>I. S. v. I. N.</i>	Trinity Term, 10 Geo. IV.	
Letters patent of king } Charles the 2d in the } Rolls chapel.	1st January, 1680.	

[*Copy the issue, to the end of the award of the venire, and proceed as follows :*]

(§ 11.)
Form of judgment for the plaintiff, in *assumpsit*.
Ante, 546.

Afterwards, the jury between the parties is respited until the — day of —, [*return of distringas, or habeas corpora,*] unless — shall first come on the — day of —, [*day of sittings, or nisi prius,*] at —, according to the form of the statute in that case made and provided, for default of the jurors, because none of them did appear.

Afterwards, on the — day of —, [*day of signing final judgment,*] come the parties aforesaid, by their respective attorneys aforesaid, [*or as the case may be ;*] and —, before whom the said issue was tried, hath sent hither his record, had before him in these words :

[*Copy postea.*]

Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* his said damages, costs and charges, by the jurors aforesaid in form aforesaid assessed ; and also £ —, for his costs and charges, by the court here adjudged of increase to the said *A. B.* with his assent ; which said damages, costs and charges, in the whole amount to £ —. ; and the said *C. D.* in mercy, &c.

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